CLERK'S COPY.
239
65367

# TRANSCRIPT OF RECORD

## SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 955

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

vs.

YOUNGERMAN-REYNOLDS HARDWOOD COMPANY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 17, 1945
CERTIORARI GRANTED APRIL 2, 1945

# INDEX


| | Page |
|---|---|
| Appellant's designation as to contents of record | 1, 3 |
| Complaint | 3 |
| Motion to dismiss | 7 |
| Answer | 7 |
| Order denying motion to dismiss | 8 |
| Proceedings | 8 |
| Findings of fact | 94 |
| Conclusions of law | 97 |
| Opinion | 96 |
| Final judgment | 97 |
| Motion to amend findings of fact and conclusions of law | 98 |
| Order that findings be amended | 103 |
| Notice of appeal | 104 |
| Designation of record | 105 |
| Stipulation | 106 |
| Motion to compile time records | 111 |
| Order | 111 |
| Stipulation | 112 |
| Motion to extend time for filing record and docketing | 122 |
| Order extending time for filing record and docketing | 123 |
| Certification of transcript | 124 |

Testimony of Witnesses:

| | Dir. | Cross | Redir. | Recross |
|---|---|---|---|---|
| | Page | Page | Page | Page |
| For Plaintiff: | | | | |
| Joe S. Reese, Jr | 16 | 27 | 31 | 32 |
| James H. Ogle | 32 | 45 | 48 | |
| (Recalled) | | | | 67 |
| Ed Hall | 49 | 54 | 55 | 56 |
| Bob Noye | 57 | 58 | 59 | |
| Clifton Holmes | 59 | 62 | | |
| (Recalled) | 70 | | | |
| John Taylor | 62 | | | |
| (Recalled) | | 91 | | |
| For Defendant: | | | | |
| G. C. Youngerman | 71 | 80 | 83 | |
| John Logan | 83 | 87 | 89 | |
| Jesse L. Willette | 89 | 90 | 91 | |
| C. L. Daniels | 91 | 93 | 93 | |

| | Page |
|---|---|
| Defendant's exhibits: | |
| 1. Sample pay roll | 106 |
| 2. Affidavit of Ed Hall | 107 |
| 3. Affidavit of Ed Hall | 108 |
| 4. Employment agreement | 108 |
| 5. Employment agreement | 109 |
| 6. Employment agreement | 110 |
| Plaintiff's exhibits: | |
| 1. Compiled time and wage sheets | 115 |
| 2. Letter, December 11, 1941, Joe S. Reese, Jr., to Wage and Hour Division | 121 |
| 3. Letter, December 16, 1941, Robert L. Till to Joe S. Reese, Jr. | 122 |

## Proceedings in Circuit Court of Appeals


| | Page |
|---|---|
| Minute entry of argument and submission | 125 |
| Opinion, McCord, J | 125 |
| Judgment | 127 |
| Petition for rehearing | 128 |
| Answer to petition for rehearing | 131 |
| Order denying petition for rehearing | 133 |
| Clerk's certificate | 134 |
| Order allowing certiorari | 134 |




639686—45

*Appellant's designation as to contents of record*

Filed 3/14/44

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, APPELLANT

*v.*

YOUNGERMAN-REYNOLDS HARDWOOD CO., INC., APPELLEE

To the Honorable OAKLEY F. DODD, *Clerk of the above Court:*

Pursuant to Rule 23.1 of the rules of the above Court, you are hereby requested to print only the following portions of the record in the above case:

1. Complaint, filed March 17, 1943.
2. Motion to dismiss and answer, filed April 5, 1943.
3. Order on motion to dismiss and objections to interrogatories, filed May 5, 1943.
4. Court reporter's transcript of evidence and proceedings at trial.
5. Plaintiff's Exhibit No. 3.
6. Defendant's Exhibit No. 4.
7. Defendant's Exhibit No. 5.
8. Defendant's Exhibit No. 6.
9. Findings of fact, opinion, conclusions of law and final judgment, filed October 25, 1943.
10. Motion to amend findings of fact and conclusions of law, filed November 4, 1943.
11. Order on plaintiff's motion to amend findings of fact and conclusions of law, filed November 12, 1943.
12. Notice of appeal, filed January 22, 1944.
13. Designation of record and proceedings to be contained in the record, filed January 22, 1944.
14. Stipulation between the parties, dated February 23, 1944, providing for substituting in the record on appeal a compilation, to be designated Plaintiff's Exhibit No. 1, of the wages and hours of lumber stackers in lieu of the daily time sheets, introduced in evidence as Plaintiff's Exhibit No. 1, and the permanent time and payroll records, introduced in evidence as Plaintiff's Exhibit No. 3, filed February 25, 1944.
15. Motion for order requiring substitution of compilation, discussed under Item No. 14, hereinabove, in lieu of Plaintiff's Exhibits Nos. 1 and 2, filed February 25, 1944.

16. Order requiring substitution of compilation, discussed under Item No. 14, hereinabove, in lieu of Plaintiff's Exhibits Nos. 1 and 2, filed February 25, 1944.

17. Motion for order extending time for filing of record on appeal and docketing the action in Circuit Court of Appeals, filed February 25, 1944.

18. Order extending time for filing of record on appeal and docketing the action in Circuit Court of Appeals, filed February 25, 1944.

19. This request.

Dated: March 14, 1944.

DOUGLAS B. MAGGS,
*Solicitor,*
ARCHIBALD COX,
*Associate Solicitor,*
AMZY B. STEED,
*Acting Regional Attorney,*
JACK H. MCGUIRE,
*Associate Attorney,*
*United States Department of Labor,*
*Attorneys for Plaintiff.*

STATE OF LOUISIANA,
*Parish of Orleans.*

Before me, the undersigned authority, a Notary Public in and for the Parish and State aforesaid, duly commissioned and qualified, personally came and appeared: Amzy B. Steed who being by me first duly sworn did depose and say:

That he has served a copy of the foregoing request that only designated portions of the record be printed on the attorneys for defendant-appellee by placing the same in an envelope, properly addressed to Ball and Ball, Attorneys at Law, First National Bank Building, Montgomery, Alabama, the envelope being a franked envelope used by the Government and requiring no postage, and depositing said envelope on the 14th day of March 1944, at 1:35 o'clock, p. m., in a United States mail box, maintained for the purpose of receiving mail and located in the Richards Building, 837 Gravier Street, in the City of New Orleans, Parish of Orleans, Louisiana.

AMZY B. STEED.

Sworn to and subscribed before me, this 14th day of March 1944.

[SEAL] HERMAN M. BAGINSKY,
*Notary Public.*

*Appellee's designation as to contents of record*

Filed 3/17/44

To the Honorable OAKLEY F. DODD, *Clerk of the above court:*

Pursuant to Rule 23.1 of the rules of the above court, you are hereby requested to print the following additional portions of the record in the above case in addition to the portion which the appellant has requested you to print.

1. Defendant's Exhibit Number 1.
2. Defendant's Exhibit Number 2.
3. Defendant's Exhibit Number 3.
4. This request.

Dated: This March 15, 1944.

FRED S. BALL, JR.,
*Attorney for appellee.*

STATE OF ALABAMA,
*Montgomery County.*

Before me, the undersigned authority, a Notary Public in and for the State and County aforesaid, duly commissioned and qualified, personally appeared Fred S. Ball, Jr., who being by me first duly sworn, did depose and say:

That he has served a copy of the foregoing request that certain designated portions of the record be printed on the attorneys for the appellant by placing the same in an envelope properly addressed to Amzy B. Steed, 1007 Comer Building, Birmingham, Alabama, the envelope containing the necessary postage, and depositing said envelope on the 16th day of March 1944, at 11 o'clock, A. M. in the United States mail box maintained for the purpose of receiving mail and located in the First National Bank Building in Mongomery, Alabama.

FRED S. BALL, JR.

Sworn to and subscribed before me on this 16th day of March 1944.

RICHARD A. BALL,
*Notary Public,*
*Montgomery County, Alabama.*

*Complaint*

I

Plaintiff brings this action to enjoin defendant from violating the provisions of Sections 15 (a) (1), 15 (a) (2), and 15 (a)

(5) of the Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, 52 Stat. 1060; U. S. C. Title 29, Sec. 201 et seq.) hereinafter called the Act.

II

Jurisdiction of this action is conferred upon the court by Section 17 of the Act.

III

Defendant is, and at all times hereinafter mentioned was, a corporation organized under and existing by virtue of the laws of the State of Tennessee, doing business and having its principal office and place of business in the Weil Building in the City of Montgomery, Montgomery County, Alabama, and having a manufacturing plant at Samson, Geneva County, Alabama, both within the jurisdiction of this Court, and is, and at all times hereinafter mentioned was, engaged at its said places of business in the production, sale, and distribution of lumber and timber products.

IV

At all times hereinafter mentioned, defendant employed and is employing approximately 75 employees in and about its manufacturing plant at Samson, Geneva County, Alabama, in the production of lumber and timber products and in processes or occupations necessary to such production. Substantially all of the goods produced by these employees have been, and are being, produced for interstate commerce and have been, and are being, shipped, delivered, transported, offered for transportation, and sold in interstate commerce from defendant's said place of business to other states.

A substantial portion of defendant's business consists in the transportation, offering for transportation, shipping, delivering, and selling in interstate commerce, lumber and timber products produced by the employees of certain sawmill and lumber manufacturing plants located in the State of Alabama, which lumber and timber products have been and are being sold to the defendant, and upon the order of, for the account of, and on behalf of defendant, have been and are being transported, offered for transportation, shipped, delivered, and sold in interstate commerce, from the said plants and lumber yards of the said sawmills and lumber manufacturing plants to, into, and through states other than the State of Alabama.

V

Defendant repeatedly has violated and is violating the provisions of Sections 7 and 15 (a) (2) of the Act by employing certain of its employees as lumber stackers on a piece-work basis in the production of goods for interstate commerce, as aforesaid, for workweeks longer than 44 hours during the year beginning October 24, 1938, for workweeks longer than 42 hours during the year beginning October 24, 1939, and for workweeks longer than 40 hours since October 24, 1940, without compensating these employees for their employment in excess of 44, 42, and 40 hours, in workweeks during such periods, at rates not less than one and one-half times the regular rate at which they were employed.

VI

On October 21, 1938, the Administrator of the Wage and Hour Division, United States Department of Labor, pursuant to the authority conferred upon him by Section 11 (c) of the Act, duly issued and promulgated regulations prescribing the records of persons employed and of wages, hours, and other conditions and practices of employment to be made, kept, and preserved by every employer subject to any provision of the Act. The said regulations, and amendments thereto, were published in the Federal Register and are known as Title 29, Chapter V, Code of Federal Regulations, Part 516.

VII

Defendant, an employer subject to the provisions of the Act, repeatedly has violated and is violating the provisions of Sections 11 (c) and 15 (a) (5) of the Act, in that since October 24, 1938, it has failed to make, keep, and preserve adequate and accurate records of its employees and the wages, hours, and other conditions and practices of employment maintained by it, as prescribed by the said regulations in that the records kept by defendant failed to show adequately and accurately, among other things, the hours worked each workday and each workweek, the total straight-time earnings for each workweek, and the total weekly overtime excess compensation with respect to many of its employees.

VIII

Defendant repeatedly has violated and is violating the provisions of Section 15 (a) (1) of the Act, in that since October 24,

1938, it has shipped, delivered, transported, offered for transportation and sold in interstate commerce from its said place of business to other states, goods in the production of which many of its employees were employed in violation of Section 7 of the Act as alleged.

IX

Defendant repeatedly has violated and is violating the provisions of Section 15 (a) (1) of the Act, in that since September 26, 1942, defendant has transported, offered for transportation, shipped, delivered, and sold in interstate commerce, lumber and lumber products produced in violation of Sections 6 and 7 of the Act by certain employees of certain sawmills and lumber manufacturing plants located in the State of Alabama, which lumber and lumber products have been produced by the said employees for interstate commerce, and have been and are being sold to defendant, and upon the order of, and on behalf of defendant have been and are being transported, offered for transportation, shipped, delivered, and sold in interstate commerce from the said plants and lumber yards of the said sawmills and lumber manufacturing plants, to, into, and through states other than the State of Alabama.

X

Defendant has, since the effective date thereof, repeatedly violated the aforesaid provisions of the Act. A judgment enjoining and restraining the violations hereinabove alleged is specifically authorized by Section 17 of the Act.

Wherefore, cause having been shown, plaintiff demands judgment permanently enjoining and restraining defendant, its officers, agents, servants, employees, and attorneys, and all persons acting or claiming to act in its behalf and interest, from violating the provisions of Section 15 (a) (1), 15 (a) (2), and 15 (a) (5) of the Act, and such other and further relief as may be necessary and appropriate.

IRVING J. LEVY,
*Acting Solicitor,*
WILLIAM A. LOWE,
*Regional Attorney,*
ALEXANDER E. RALSTON, Jr.
*Assistant Attorney,*
*United States Department of Labor.*

Post Office Address: % Solicitor of Labor, U. S. Department of Labor, 1007 Comer Building, Birmingham, Alabama.

Filed Mar. 17, 1943. O. D. Street, Jr., Clerk. By Annie Schoolar, Deputy.

*Motion to dismiss*

Comes the defendant and moves the court to dismiss the complaint on the following grounds:

1. The complaint fails to state facts on which any rights to the relief prayed for could be lawfully granted.
2. The complaint is vague and indefinite in its allegations and no facts are stated upon which the relief prayed for could be lawfully granted.
3. The complaint seeks injunctive relief against the defendant but fails to state facts that would justify the granting of such relief.
4. The complaint fails to state any specific violation of law.
5. The complaint fails to state any specific acts or omissions which if proved would justify the issuance by this court of an injunction.
6. The complaint fails to set out a copy of the regulations referred to in paragraph VI.
7. The attempted delegation by Congress to the administrator of the right to make regulations with reference to keeping records is unconstitutional.
8. The complaint is vague and indefinite in its allegations as to what the defendant failed to do with reference to keeping books or records as a conclusion in the complaint.
9. The complaint is vague and indefinite in its allegations as to the "certain employees" of "certain sawmills" referred to in paragraph IV.
10. The complaint fails to state facts but sets out the mere conclusions of the pleader.

Wherefore, defendant prays that the complaint be dismissed.

*Answer*

Without waiving the foregoing motion but insisting thereon, defendant answers the complaint as follows:

1. It admits the allegations of fact but not the conclusions alleged in paragraphs 1, 2, 3, and 4 of the complaint.
2. Defendant denies the allegations of paragraph 5.
3. Defendant denies the allegations of paragraph 6 with reference to the authority of the plaintiff to make the regulations therein set out.
4. Defendant denies the allegations of paragraphs 7, 8, 9, and 10.

Served by mailing a copy of the foregoing to Hon. William A. Lowe, Regional Attorney, 1007 Comer Building, Birmingham, Alabama, on this April 3, 1943.

FRED S. BALL, Jr.,
*Attorney for defendant,*
*Address: Montgomery, Alabama.*

Filed Apr. 5, 1943. O. D. Street, Jr., Clerk. By Annie Schoolar, Deputy.

*Order*

This cause coming on for hearing this 30th day of April on defendant's motion to dismiss and plaintiff's objections to answering defendant's interrogatories 7, 8, 9, and 13, and after argument of counsel and good reason therefor appearing, it is

Ordered, by the Court, as follows:

1. Defendant's motion to dismiss be, and it hereby is, denied.

2. Plaintiff's objections to answering defendant's interrogatories 7, 8, 9, and 13 be, and they hereby are, sustained.

3. Plaintiff is given 30 days from April 30, 1943, to file more specific answers to defendant's interrogatories 1, 2, 3, 4, 5, 6, 10, 11, and 12.

C. B. KENNAMER,
*United States District Judge.*

Dated: May 5, 1943.

Filed May 5, 1943. O. D. Street, Jr., Clerk. By Annie Schoolar, Deputy.

PROCEEDINGS

The COURT. Gentlemen, are you ready to proceed in this matter?

Mr. STEED. The plaintiff is ready, Your Honor.

Mr. BALL. The defendant is ready.

The COURT. If there are any witnesses to be examined, let them come around and be sworn. All of the witnesses in this case come around and be sworn.

(Witnesses sworn.)

The COURT. Is it desired to have the rule? Does either side desire the rule for the witnesses?

Mr. STEED. We do, Your Honor.

The COURT. Witnesses will be under the rule in this case. You are not to talk about the case, or about your testimony, one witness with the other, during the progress of the trial. You can discuss your testimony with the attorneys in this case, and in the event you do you will be separate and apart from the

other witnesses, but, before and after you give your testimony it is not proper to discuss your testimony, nor to discuss it after you have testified.

Mr. BALL. Your Honor, we would like to have excepted from the rule Mr. Reese, Mr. Youngerman, and Mr. Reynolds.

The COURT. Well, Mr. Youngerman and Mr. Reynolds are parties.

Mr. STEED. Your Honor, as to our witnesses we desire to except from the rule, Mr. James H. Ogle.

The COURT. Gentlemen, I am going to make this statement. We have had two or three pretrial conferences in this case, and I have been somewhat impressed from these conferences that there is really not much dispute about the facts in this case. Of course, there is one issue I have not heard much discussed on as to what the facts are, and that is due to the failure to keep records and things of that kind, but, as to the fact that these employees worked, and how they worked, and the arrangements under which they worked, and that their pay did not include overtime, I understand that there is not any issue between you gentlemen on that.

I am not going to try to chart the way you try your case, but I do not see any use in taking up a whole lot of time putting on witnesses on facts about which there is no dispute.

Mr. STEED. If Your Honor please, I would like to say in that connection, that we understand and I think the proof will show that the defendant, prior to the suit, has made certain efforts as to adjustment that may be what we consider an evasion of the overtime requirements; for that reason, while we desire to get along just as fast as we can, it will be necessary, of course, that we go into this overtime proposition, but I can assure you that we are just as anxious as the Court is, and I know Mr. Ball is anxious to move along, and, for that reason, we will attempt to expedite this.

Before we call the first witness, Your Honor, it might be helpful if I briefly recite the issues involved, and just what has transpired at these various pre-trial conferences, in an attempt to point out to Your Honor just what we are concerned with here today.

Of course, in our complaint we allege that the defendant was engaged in the production, sale, and distribution of lumber and rough timbers, I think they call them construction timbers, in its place of business down at Samson, Alabama. We allege that the defendant corporation maintains its home office here in Montgomery. We allege that the company, in its Samson operation, was employing approximately 75 employees in the

production of this lumber, a substantial part of which was being produced, transported and offered for transportation in interstate commerce, to, into and through states other than the State of Alabama from the Samson plant. We further allege that the defendant had failed to pay overtime compensation to lumber stackers. We allege that this failure to pay overtime compensation to the stackers arose through their failure to pay these stackers time and one-half for hours in excess of forty-four during the first year of the Act, time and one-half for hours in excess of forty-two during the second year of the Act, and time and one-half for hours in excess of forty during the third year of the Act, and thereafter.

We allege that, under the language of Section 7, these stackers have not been paid overtime compensation during these periods on the basis of time and one-half times their regular rates of pay for hours worked——

The COURT. I don't know what you are doing except reiterating the averments of your bill. The bill speaks for itself, doesn't it, as to what is alleged?

Mr. STEED. That is true, but I was hoping, Your Honor, if I might, to then show you just what we have accomplished in these pretrial hearings, and briefly point out the issues that remain.

The COURT. That is what I am trying to get to, the issues that remain.

Mr. STEED. Well, we allege, of course, failure to comply with Section 15 (a) (1) of Act, which is the "hot goods" section, in that these defendants did ship in commerce goods produced in violation of Section 7 by these stackers.

Additionally, we allege another violation of Section 15 (a) (1) in that the defendant did ship in commerce goods produced by employees of suppliers, from whom the defendant had purchased lumber.

Now, Your Honor will recall and we would like the record to show, that we stated in the pretrial hearings the other day that subsequent investigation undertaken by the Administrator, since the filing of this suit, reveals that these suppliers might probably be in compliance with the Act at this time, and for that reason we are not going to press that allegation.

Then, of course, there is the record keeping allegation, or allegations with reference to record keeping violations.

Now, the defendant, in answering the complaint, with reference to each of these paragraphs, rather allegations, concerning coverage, stated that he admitted the facts of the complaint.

I take it by that he admits a substantial part of the lumber had been produced, that is, manufactured, within the State of Alabama and transported to, into and through states other than the State of Alabama, but he would not admit and does not admit the allegation which followed that, to the effect that such activities constituted the production of goods for commerce on the part of this defendant, and production of goods for commerce on the part of these employees, stackers.

In the pretrial hearing the other day, counsel for the defendant stated that he was willing to stipulate coverage. This would take that issue out of the case.

However, and in accordance with Your Honor's suggestion, we got together with Mr. Ball a little later and we could not agree on a satisfactory form of stipulation. In other words, Mr. Ball takes the position, if I am not correct, and Mr. Ball will correct me, that he is willing to stipulate only as to a substantial part of the workweeks, or part of the workweeks, but we are prepared to show that coverage exists during every workweek; that approximately 85 per cent of the lumber produced finds its way ultimately through the channels of interstate commerce, and that these stackers handled practically all of the lumber that moves out of the state; they handled that lumber indiscriminately during every workweek; they handle the lumber without regard to its ultimate destination. So it has, therefore, become necessary, and will be necessary, for us to adduce proof to show that there is coverage with respect to both the company and as to the employees, and then, after we adduce proof with reference to coverage, we propose to show that there is a violation.

The COURT. You have got to offer proof that the lumber moved in interstate commerce.

Mr. STEED. To show the coverage; yes.

The COURT. I thought that was admitted.

Mr. BALL. We admitted that. In fact, Your Honor,——

The COURT. I think that is expressly admitted in the answer filed.

Mr. STEED. Your Honor, if I might make this observation. He did admit in his answer the facts in our complaint with reference to the production of this stuff or lumber for out of state purposes.

The COURT. Well, didn't he admit that the respondent in this case, who are the lumber business, were engaged in interstate commerce?

Mr. BALL. We admitted the facts that would naturally result, but we did not admit his conclusions of law. We admitted the facts.

The COURT. I don't think there is any need to introduce anything on the issue of interstate commerce.

Mr. STEED. Then, do I understand the company admits that both the company and these stackers are engaged in interstate commerce.

Mr. BALL. We admitted that, Your Honor.

Mr. STEED. That is during the time involved in this action.

Mr. BALL. Not every week. They wanted us to admit every week; but not every week.

Mr. STEED. During every workweek.

Mr. BALL. Well, substantially all the time, if not every week.

Mr. STEED. Your Honor, that is the position we find ourselves in after these pretrial hearings. We are prepared to show, and we submit that it is encumbent upon us to show or to establish coverage if it exists during every workweek, because, conceivably there might not be a violation some workweeks and it might be that when we establish violations——

The COURT. Well, substantially during the time that is in question, their main business has been shipping lumber in interstate commerce. Wouldn't that cover their entire operations during that period of time? You would not have to offer proof that every week they shipped lumber, or failed to ship some. There may be some weeks that they were closed down and did not ship anything at all.

Mr. STEED. Here is the situation: We do not want to confine ourselves in a stipulation such as that, that employees during certain workweeks were not covered——

Mr. BALL. No, Your Honor, let me get the record straight on that. Whenever we were running down at Samson we were making lumber for interstate commerce. Now, that ought to cover it.

Mr. STEED. And that the employees, the stackers, were engaged in the production of goods for interstate commerce.

Mr. BALL. The stackers were part of the production down there. We had to have men to stack lumber in order to produce it; it had to be dried and had to be stacked before it got dry and whenever we were working down there we were working in interstate commerce. We admitted that all the way through.

Mr. STEED. That is entirely satisfactory, Your Honor, as far as I am concerned.

The COURT. I don't think there is any issue between you folks on that basis.

Mr. STEED. Mr. Ball, that includes all the time involved in this action, or rather, up to date, I understand.

Mr. BALL. Your Honor, there hasn't been any difference in our operations from the beginning down to yesterday. We changed our method of operation yesterday, with reference to our stackers. We entered into a contract yesterday with our stackers which, when we get to it, we hope that the Court will say that brings us clearly within the Act. We think we have been within the Act and within the law all the time, but yesterday we entered into contracts with our stackers which, when we get to them, we hope the Court will say that it is within the law. Now, up until yesterday, our operations have been the same, except to this bill for injunction filed, and we did not know what the law was and could not find a case that held what the law was on stackers, piece workers, so, in order to hold ourselves in status quo, and to recognize our submission to the Court, we have paid our men what we have called advances—we have not known how to pay them—but we have given them money and put it on our books as advances.

Now, we have entered into a contract yesterday, which I think will take care of all of that, and, up until yesterday, and with the exception just mentioned, since the bill was filed in March, our operations have been the same.

Mr. STEED. Now, Your Honor, in connection with that, we would like to make just one other statement.

The Act, of course, authorizes the Administrator to promulgate rules and regulations with reference to records on wages and hours that must be maintained by any employer subject to wage and hour standards. The regulations, of course, were issued and published in the Federal Register. Your Honor is, of course, familiar with the provisions of the Federal Register Act which states that a regulation such as that one——

Mr. BALL. We concede that the regulations have been properly promulgated.

Mr. STEED. We are asking that the Court take judicial notice of the regulations and we understand now your allegations in the answer that they might not have been properly issued——

Mr. BALL. We admit the fact that they have been properly promulgated.

Mr. STEED. And the Federal Register Act, of course, also provides for, Your Honor, that they shall be deemed, from a prima facie standpoint, valid when published in the Federal Register,

and I want to point that out, and we want the Court to take judicial notice of the terms of the Administrator's wage order which was promulgated under Section 6 (a) (4) of the Act for employees engaged in the lumber and timber products industry; that wage order which became effective on November 3, 1941, which prescribes a minimum wage rate of 35¢ an hour.

Mr. BALL. We admit that, Your Honor please, there is no need to prove that. We admit the 35¢ an hour wage order in 1941, November 1941. We concede that, Your Honor.

Mr. BALL. Your Honor, we have stated our position, and it is simply that we have been running a mill down there and trying to obey the law. We expect the evidence to show that we have had three inspections, one in 1940, one in 1941, and one in 1942. In each one of those inspections, up until the last one last Fall, before this suit was filed, our method of paying our stackers was observed by the inspectors and was approved. There was no objection made to it, and no request made on the part of the inspectors themselves to change our method of paying our men; our stackers.

Now, last Fall, when we had an inspection, they said we could not pay them like we had been doing, like we had been paying them, and this bill was filed within a few months thereafter.

Now, since that time I have made an *exhausted* study trying to find out what the law is about this piece work. Can you hire a man not on a time basis, not on a day or week or month basis, but, can you work him on the basis of disregarding the element of time all together, and hire him on the basis of—"now, I have got a certain piece of work to be done, you work on your own time, when you want to work, and we will pay you for the result."

Now, I have not found any law and the plaintiff's lawyers have not found any law, except two very obscure cases that are not controlling authorities. So, our position has been one of extreme doubt. We don't know what to do. We haven't found any law that says it is unlawful, and we haven't even found any statute or case which says it is unlawful to do what we have been doing, yet, at the same time it has been lawful. In other words, everything is lawful until some law makes it unlawful.

So, our position in this case, in addition to what the attorney has stated, is this: We have paid our men by the piece, and I think most of the time they got the lawful rates, and we were doubtful about that, but the Administrator made regulations saying you have got to keep hours, and we wanted to meet

that condition, so, we kept the hours. Now, those hours that we kept, under the Wage and Hour Law, and the 35¢ an hour promulgated, figured overtime at time and a half over that amount, at all times has been less than the amount we paid each of these stackers. In other words, at all times, we have paid our stackers more in dollars for the work they did on the job basis than it would have figured reduced to a time basis. So, we say we have not violated the law, and in addition to that, we say that yesterday, after the pre-trial conference, and after having studied these things, we came to the conclusion that it would be lawful to enter into a contract sanctioned by the United States Supreme Court in the Below case, and under that contract, which will be in evidence, we have agreed on the figures we would pay them, agreed on the rate per hour, and that we would pay them so much money, not a fixed sum, as in the Below case, but a sum to be fixed in accordance with the amount of lumber stacked. In other words, we pay them under the Wage and Hour Law, and in addition to that pay them some more money in proportion to what they produce, what work they accomplish.

Now, the Wage and Hour Law does not say that you must pay a person any more than the minimum, but not less than the minimum. It does not prohibit you from paying more, and we have made an agreement to pay them more if the amount of lumber they stacked figured on the agreed basis is more. Now, if the work they do figured on an hourly basis, is more than that figured on a job basis, we pay them on the hourly basis nevertheless. In other words, there are no circumstances under which we pay them, under this new contract, less than the Wage and Hour law provides. We know, from past experience, that we will pay them more, because they will earn more money by stacking lumber.

Now, let me say, in conclusion, Your Honor, that this whole piece-work problem is created not by the lumber mills, to cut the cost, or to avoid the Wage and Hour Law, or anything of that kind; but it has been made necessary because the men themselves, the stackers themselves, wanted to make more money than if they were working by the hour. In other words, we have been forced to pay a piece-rate basis whether we like it or not, we are forced to pay that labor, pay them on that basis, because that is the only basis they would be willing to work on.

So, our position is, Your Honor, we have not violated the law, and we had no idea to do it; but in order to make our position doubly certain, we have entered into a new contract, which we think is unquestionably within the law.

Mr. STEED. I might state, Your Honor, in conclusion, that it is our intention and purpose to show——

The COURT. I don't understand you.

Mr. STEED. I say it is our intention and purpose to show, up until yesterday, and right on to today, this case is controlled by the Supreme Court decision in the Missel Case. We understand now that there is no pretense, probably, with respect to having any so-called Below contract. We will further show that the contract, or what they call a contract, that was entered into, is not in effect a contract such as the Below contract, such as that approved by the Supreme Court of the United States, or the Circuit Court, whose decision in a 5–4 decision was subsequently affirmed by the Supreme Court.

The COURT. All right. Let us hear your testimony.

Mr. STEED. Your Honor, we would like to call for a return to the subpoena duces tecum directed to the Corporation.

Mr. BALL. All right. You have the records here on the table.

Mr. STEED. We would like to have someone put on the stand, Mr. Ball, to identify those records.

Mr. BALL. That would be Mr. Reese. He is not in the room. We will have to call him.

(Mr. Reese enters courtroom.)

By Mr. BALL:

You are asking now for the stackers' records, the records of the hours, the amount they worked, is that what you want?

Mr. STEED. The records of the hours worked and the wages paid to the stackers from October 24th, 1938, through September 15th, 1943.

JOE S. REESE, Jr., a witness for and in behalf of the plaintiff being duly sworn, testified as follows:

Direct examination by Mr. STEED:

Q. Please state your name.

A. Joe S. Reese, Jr.

Q. By whom are you employed?

A. Youngerman-Reynolds Hardwood Company, Incorporated.

Q. In what capacity?

A. Office Manager.

Q. Mr. Reese, how long have you been employed by Youngerman-Reynolds?

A. Since October 1937.

Q. As office manager, in general, what are your duties?

A. Head of the accounting department, which takes care of all the records, the invoices, supervision of the invoices, assisting in traffic and routing of cars.

Q. Well, just what connection do you have with reference to the maintenance of records of wages and hours of employees in Samson?

A. I have charge of the records in the Montgomery office, where we transfer the time sheets to the pay-roll book.

Q. Could you explain to the Court, if you know, the manner in which these records are kept in Samson before their arrival in your office?

A. They are kept on an individual foreman's time book and transferred to what is known, to what we call time sheets, and a copy of the time sheets are mailed to the Montgomery office.

Q. Now, of course, you are stationed here in the Montgomery office?

A. That is right.

Q. Then, as I understand, the time sheets, or the daily time sheets, are transmitted by the Samson plant superintendent or someone there?

A. Someone under his supervision.

Q. To your office at the end of each day?

A. Yes, sir.

Q. Now, upon receipt of those daily time sheets, just what does your office do?

A. We check the extension and then post them to what we call the master pay-roll book daily. Each man's name is on the pay-roll book and the number of hours and the amount that he earns is posted in that pay-roll book.

Q. Now, will you pick out here at random a daily time sheet and just point out, briefly, what information is contained on that sheet?

A. It shows here that Willie Smith worked on what we call the hardwood shaft and for 9 hours made a total of $3.60.

Q. Now, let us take on that pay roll, and will you tell the Court, the workweek or, rather, the workday that the daily sheet covers?

A. The workday is December 31, 1941.

Q. Now, will you pick out on that pay roll the pertinent information relative to the lumber stacker?

A. The lumber stacker is not shown on this pay-roll sheet.

Mr. BALL. He wants one where we have some lumber stacking being done on that day.

The WITNESS. We did not do any lumber stacking that day.

Mr. BALL. Find him one where we did some lumber stacking, where we had some stacking going on.

The WITNESS (examines papers). Here is one.

By Mr. STEED:

Q. Mr. Reese, can you pick out here a workweek prior to January 1942, a workday?

A. Prior to that?

Q. That is right.

The COURT. I want to say right here, now, gentlemen, the government, or the Wage and Hour Division has got Inspectors and Examiners who go around, and these records are available to them, and they have an opportunity to check them and show what they want to the Court before they come to the Court, and this Court is not going to sit here for hours at a time to go through them here now to find out—at least you should have the evidence where it can be presented to the Court.

Mr. STEED. I think we will have that by one of our later witnesses. We want to show by the witness if they have maintained proper records.

The COURT. Why not call this witness to identify these records, and show that they are the records by your own witness and bring it to the Court's attention.

By Mr. STEED:

Q. Will you point out here these daily time records that you brought out of these records, the daily time records that came up from Samson?

A. Those are the daily time records that came up from Samson.

Mr. STEED. Mark those for identification, please.

(Marked "Plaintiff's Exhibit 1," for identification.)

By Mr. STEED:

Q. These daily time records, of course, contain a record of the daily hours worked by employees of the Samson plant, and are records, according to your testimony, which are sent in at the close of each workday by the Samson plant to the Montgomery office?

A. Yes.

Q. Will you point them out to the Court, now? Are those the daily time records, that pile?

A. They are.

Q. Are those the daily time records?

A. Through what period?

Q. The period from October 24, 1938, through January 15th, 1943?

A. I have not checked them carefully, but I will. It is through 1943, all right.

Q. Well, we will see that they contain all those. Now, Mr. Reese, will you point out this permanent pay roll, the time pay roll record, that you maintain in the Montgomery office?

A. We have got those all around here.

Q. Those are all around here?

A. Yes.

Q. Show us a work week covered by the pay roll record during the month of January 1943?

Mr. BALL. Your Honor, I am going to object to that. I am going to object to that on the ground that Your Honor raised awhile ago. We have got the records here. Now, this witness is in the Army and he just got in here last night especially to appear here as a witness, and he asked him to go through all of these records and find stuff they ought to have had ready. So, we object to that method of examination.

The COURT. I am not going to let employees of the Respondent be put up here to find and to dig out evidence, when one of the employees of your own Division can do that.

Mr. STEED. If Your Honor please, I submit there are certain matters——

The COURT. I don't know. It may take hours to have this witness do that. I guess, Mr. Steed, there are so many items of information that we do not have. For instance, if I discover a work week in January 1943, I may want a work week which started in May 1943 to show what the changes were made in their policy with respect to these stackers.

You want to show me you made a thorough inspection, but you are not prepared to point that out?

Mr. STEED. That is true, Your Honor, since 1943 they changed their record-keeping system.

The COURT. Couldn't your representative call attention to the fact, to show where that is in the record?

Mr. STEED. Our representative could not describe the effect, Your Honor, of a duplicate set of records that were kept from May on. We cannot tell ourselves, but he can. A responsible official in the company may do that.

The COURT. If you have some specific date in mind, I will expect you to ask about that.

By Mr. STEED:

Q. I am going to ask you, Mr. Reese, to take a daily time sheet from these records, and point out to us the lumber stackers during May 1943; point it out to the Court?

A. (Examining papers.) Here is one on May 8th.

Q. That is a daily time sheet?

A. That is a daily time sheet.

Q. Now, will you show us the record that you maintained for that workweek in your office?

A. That was not posted on the master time book at this time up until this case was filed. When this case was filed, and we had the first hearing, we held that in abeyance until something definite was said as to how to settle these things. We paid the stackers on a piece rate in advance figuring it down to the penny, making such deductions necessary for Social Security.

Q. What I am interested in now is to show me the pay-roll record, Mr. Reese, where you paid those stackers from May forward, and we are particularly interested in having you explain to the Court this so called advance system which has the appearance here as duplicate records.

Mr. BALL. You asked him to explain it. He can explain it.

By Mr. STEED:

Q. Pull out one of these records where these so called advance payments are attached. It should be in your permanent book. Identify it further.

A. It is not annexed to any of these on there. This is the permanent record.

Mr. BALL. That just shows the amount of money the man is entitled to.

The WITNESS. It shows when he got it, when we paid it, and then, at the end of two weeks we post it permanently.

The COURT. Is that the book record?

The WITNESS. The daily time sheet and these records are the only records we have.

The COURT. That would ordinarily have been transferred to the permanent system, until that controversy came up with the Wage & Hour Division, when there was doubt as to your compliance with the law?

The WITNESS. Yes.

Mr. BALL. It would show the total hours.

The WITNESS. Yes sir; the total hours, and the total payments we regularly pay to them.

Mr. STEED. Just a moment, Mr. Reese. Your Honor, that is what we are interested in.

By Mr. STEED:

Q. Will you first tell the Court when you started maintaining this second record here?

A. Soon after this case was filed. The exact date, I am not sure.

Q. Now, will you tell the Court, for example, if first the record covers the stackers for the pay period ending May 29, 1943?

A. That is right.

Q. In other words, as I understand it, it is for the two weeks preceeding May 29th, 1943?

A. That is right.

Q. Now, will you point out to the Court just what this record contains with reference to Ed Hall, for example?

A. The stacking sheet covering that period, sent in from Samson, shows that Ed Hall had stacked on flat stacking 18,100 feet. Ed Hall flat stacked that 18,100 feet plus 24,600, making a total——

Q. For the two weeks' period?

A. For the two weeks' period it made a total of 42,700 feet.

Q. And on what basis was that stacking paid for?

A. Paid on the basis of 70¢ a thousand.

Q. What does this record show with reference to the amount due Ed Hall?

A. It shows he is due $29.89.

Q. What does the record show with reference to the amount actually paid Ed Hall?

A. It shows Ed Hall $29.89, and he had a deduction of $3.43, and we gave him a check for $26.46.

Q. But the record indicates he was paid $29.89 on the basis of having flat stacked 42,700 feet at 70¢ a thousand?

A. That is right.

Q. Now, will you explain to the Court what this record shows, that is, the page of the record from which you just read, with reference to Ed Hall's employment during that period?

A. This record shows the number of hours worked. The first week he worked 46½ hours and the second week he worked 16 hours. He worked a total in two weeks of 62½ hours, and paid on the hourly rate you have an amount of $26.30.

Q. Now, this hourly rate, I am quite interested in that. What does this hourly rate mean? Just what does this record here mean, since you paid him on the basis of 70¢ per thousand for 42,700 feet stacked?

A. That record shows if it was permitted to handle it on that basis, we would be able to go back and tell what corrections were necessary. It is a recap of the time sheet made at the end of the pay-roll period, showing the number of hours.

Mr. BALL. Then, you say that if you did what?

The WITNESS. So that we would have a record of the two weeks' recap on the basis of the hourly rate as compared with the amount of dollars we paid them on the piece rate.

By Mr. STEED:

In other words, as I understand your testimony, you continued it on the piece rate basis?

A. That is right.

Q. But just for some reason, better known to the company, you set up your records of how much they would be due on the hourly rate of pay basis?

A. That is right.

Q. Do these employees, do these lumber stackers know anything about this record here?

A. They do not have access to the record.

Q. They do not know anything about this hourly record here?

A. That is right. This is kept up in the Montgomery office.

Q. When you answer the question then, all they know is that Hall received $29.89 during that period, and that Ed Hall was paid for that amount of lumber stacked?

A. That is right.

Q. That was paid on the piece rate basis?

A. Yes.

Q. This, then, is just your own record?

A. That is right.

Q. You never had any sort of agreement with the employeed that they would be paid 40¢ an hour for that week as you have set it up on that record, did you?

A. I don't know. I am in the Montgomery office. I don't know the agreements made by the foreman.

Q. You just set up your record the actual amount, as far as payment is concerned, but the record don't mean anything, because they worked on the piece rate basis?

A. That is right.

Q. Now, you pointed out to the Court that you did not inaugurate that system until after this suit had been filed, and you have also pointed out to the Court that, as far as you know, as bookkeeper, the record did not mean anything to the employees, because you continued to pay them on the basis of piece rate?

A. That is right.

Q. Will you tell the Court when, to the best of your knowledge, the company started maintaining daily hours, a daily record of the hours of these stackers?

A. I am not sure of that date. I don't know, approximately.

Q. Well, do you know whether it was six months ago?

A. I would rather not tell, because I am not sure of the date of it; even the approximate date.

The COURT. Well, that was inaugurated after one of the representatives of the Wage & Hour Division informed the company that it was in violation of the law.

The WITNESS. That is correct.

By Mr. STEED:

Q. Can you point out to the Court the permanent time pay roll records that you maintained in Montgomery?

A. They are kept in this binder.

Mr. STEED. Will you mark that for identification as "Plaintiff's Exhibit 2."

(Marked "Plaintiff's Exhibit 2" for identification.)

By Mr. STEED:

Q. Mr. Reece, in your capacity as office manager, do you use checks in payment of wages?

A. I used checks; I prepared the checks.

Q. You prepared the checks?

A. Yes.

Q. You could not state that the employees down there have always been paid the piece rate basis?

A. Not always; no sir. There was a period when we paid them on the hourly basis.

Q. Some of the stackers were paid on an hourly rate?

A. Yes, sir.

Q. For how long a period, do you know?

A. I would say almost a year.

Q. You don't know approximately when that period was?

A. No; off hand.

Q. Now, with respect to the other employees there of the company, how are they paid?

A. On an hourly rate.

Q. Now, when the stackers worked in excess of forty-four, forty-two, or forty hours, as the case may be, on the hourly rate, did they get overtime?

A. Yes, sir.

Q. On what basis?

A. Time and one-half for overtime.

Q. Do I understand it was time and one-half their regular rate of pay?

A. That was time and one-half of their regular rate at the time.

Q. And, of course, when other employees, who were not stackers, worked overtime, they got paid for it?

A. That is right.

Q. Could you produce copies of any and all letters, petitions, papers, or other writings, or copies of any and all letters, peti-

tions, papers or other writings, signed by Youngerman-Reynolds Hardwood Company, Incorporated, and/or its employees engaged in stacking lumber in its Samson, Alabama, plant which purport to relate to the method or basis of payment of certain lumber stackers and which have been signed since October 24th, 1938?

Mr. BALL. Your Honor, the witness, of course, being our bookkeeper, and being in the Army, can identify these records, but he did not bring the records. We did bring the records and we will be glad to hand them up so that the witness can identify them.

Is that a statement of the stackers saying they are completely satisfied with their pay?

Mr. MCGUIRE. Your Honor, we object.

The COURT. Isn't that what they called for, Mr. Ball?

Mr. BALL. Before I go into this, Mr. Reese, I would like to ask you if this letter is signed by you?

The WITNESS. It was.

Mr. BALL. Would you state, very briefly, what that is—will you give us the date of that letter and the addressee?

The WITNESS. December 11, 1943, Wage & Hour Board, Birmingham, Alabama.

By Mr. STEED:

Q. I will ask you if you do not recall receiving that letter, a copy of that letter?

Mr. BALL. Your Honor, all of these letters were called on in a request for admission ten days ago, and the ten days have expired and they are in the record and admitted automatically, under the Rule. This is just killing time.

By Mr. STEED:

Q. Will you read that letter?

A. (Witness reads letter.)

Q. You received a copy of that letter, didn't you?

A. Yes.

Mr. STEED. Will you mark this for identification as "Plaintiff's Exhibit 3."

(Marked "Plaintiff's Exhibit 3" for identification.)

By Mr. STEED:

Q. And you received a copy of the enclosures in that letter?

A. Yes.

Q. Are you familiar with the circumstances surrounding the execution of these papers by the employees down there of Youngerman-Reynolds?

A. No; I am not familiar with the execution of them. I know that they were signed.

Q. How do you know that they were signed, Mr. Reese?

A. They have signatures on them before a Notary.

Q. You have not looked over them, but you do know that it was signed and the consequences are that they wanted to stack lumber on the piece rate basis. That is right, isn't it?

Mr. BALL. Generally, they will speak for themselves, Your Honor.

By Mr. STEED:

Q. Is that right?

The COURT. Don't go into an argument with this witness as to what the paper says. It is offered in evidence and discloses what it says.

Mr. STEED. Will you mark this as "Plaintiff's Exhibit 4" for identification?

(Marked "Plaintiff's Exhibit 4" for identification.)

Mr. STEED. Have you any further petitions there, Mr. Ball?

Mr. BALL. Petitions?

Mr. STEED. Yes; which fall into this category. I believe you referred to a contract which was entered into yesterday?

Mr. BALL. Yes; but that is not covered by this subpoena. I now hand to the attorney for the plaintiff all the contracts entered into yesterday with the stackers.

Mr. STEED. Mr. Ball, if you will read the subpoena, you will see it covers all petitions.

Mr. BALL. I don't understand what you mean by "petition"?

Mr. STEED. Are you familiar with the contents of this statement that was taken yesterday?

A. I am not.

Mr. STEED. Your Honor, the plaintiff offers in evidence the daily time sheets which have heretofore been identified by the witness Reese as 1, Plaintiff's Exhibit 1, and the permanent time and pay-roll records which have heretofore been identified by the witness Reese as Plaintiff's Exhibit No. 2.

And the letters dated December 11, 1941, and December 16, 1941, passed between Mr. Reese and the Regional Office of the Wage & Hour Division in Birmingham, which related to the proper method of payment of piece rate employees, as Plaintiff's Exhibit 3.

Do you have any objection to the introduction in evidence of these documents, Mr. Ball?

Mr. BALL. If I did, you would hear from me.

Mr. STEED. I expected that.

(Plaintiff's Exhibits 1, 2, and 3 for identification, received in evidence and so marked.)

By Mr. STEED:

Q. Mr. Reese, you told the Court—or would you tell the Court how, in these work weeks during which the stackers worked on the yard and also worked as stackers, how they were paid?

A. They were paid for their stacking at the piece rate, if it was during the period we were paying them on the piece rate, and did not include that period we were on the hourly rate, and the hours they put in on the yard were paid on the hourly rate at the price that their individual jobs required.

Q. Now, suppose this, if you did have during a particular work week, after you started keeping records of them, both for stacking and working on the yard, if those total hours ran over forty hours in both capacities, did you ever pay them any overtime?

A. If it run over we did.

Q. You did?

A. We did.

The COURT. You mean when they were working by the hour you paid them overtime?

The WITNESS. Did you ask that question after May?

By Mr. STEED:

Q. Perhaps I can make it clear. As I understand the testimony, there were certain work weeks in which a man stacked, may be, three or four days, and he would be paid on the piece rate basis; and if, several months ago, as I understand your testimony, they started keeping hourly records on these piece rate employees, but you did not pay them on the hourly rate, you still continued to pay them on the piece rate base, but, then, some of the stackers may go over on the yard and work on an hourly basis; for example, if he did that, would he be paid on an hourly basis? Now, suppose at the end of the work week the hours which had been turned in on the daily time sheet for stacking and the hours which had been turned in on the yard, totalled over forty; just how, and in what manner did you pay him overtime, if you did?

A. We paid him for the amount of work stacked at the piece rate, as I showed you there, and if he worked any in the yard during any of that period, he was paid at the hourly rate, and if he worked overtime on the yard at the hourly rate he was paid time and a half. I don't believe that occurred during that period.

Q. In other words, he would have to work on the yard itself over forty hours?

A. That is right.

Q. But you said right on up to today, or at least since you have been in the office there, before you left, that they continued to pay them on the piece-rate basis, and that they have not been paid on the hourly basis?

A. With the exception of that one period?

Q. And up to sometime ago?

A. As I remember it a year or so ago.

Q. And where they worked over forty hours they continued to get just the regular piece-rate pay? In other words, it is based on the number of layers stacked?

A. The number of feet stacked as shown on that record.

Q. And you did not give them additional compensation for hours over forty?

A. They were paid on the amount they stacked at the rate as shown there.

Q. Mr. Reese, suppose, for example a stacker works forty hours during a workweek stacking, let us say, he works 8 hours Monday stacking, and you pay him on the piece-rate basis for that, and then on Saturday, let us suppose, he goes over and works 8 or maybe 10 hours on the yard on the hourly basis, does he get any overtime during that week?

A. At one period, as well as I remember, we did figure all his overtime right out to exactly what it was and pay him for 10 hours or 35 or 40, whatever he would get in addition to the amount he got for stacking.

Q. And he just continued during those 10 hours, and what he got was straight time pay and not overtime?

A. That is right.

Mr. STEED. That is all.

Cross-examination by Mr. BALL:

Q. Mr. Reese, you are in the Army?

A. That is right.

Q. You came over here especially to testify?

A. That is correct.

Q. You got in here last night?

A. That is right.

Q. Could you tell, during the time you kept the records for Youngerman-Reynolds, are you in a position to say what understanding there was between the company and the em-

ployees? Did you make those agreements, or did you merely keep the records?

A. I merely kept the records. I did not make the agreements.

Q. So what the employees knew or what their understanding was is something you could not answer correctly about, is that right?

A. That is correct.

Q. Because you were stationed here in Montgomery and the work was done down in Samson; is that correct?

A. That is right.

Q. Now, the gentleman asked you about writing the Wage & Hour people about the regulations. You wrote them a letter in the Fall of 1941?

A. Yes.

Q. Now you got some regulations, a pamphlet, a long pamphlet of regulations?

A. Yes; I did.

Q. Now, that was in the Fall of 1941. After you got that pamphlet, which said you were supposed to keep records of the hours—did it say that, that you were supposed to keep a record of the hours of the piece workers?

A. It did.

Q. Did that have anything to say that you could not work a man on a piece rate basis? Do you find any statement in there promulgated, which says it was against the law to work a man on a piece-rate basis? Do you find any such statement as that in the book, in the pamphlet?

A. No, sir.

Q. You do say that it said you had to keep a record of the hours?

A. That is correct.

Q. Now, with that information that you obtained in the Fall of 1941, did you and your company, after you got that, keep the hours on these stackers?

A. We started right after that bulletin came in, I think it was the following month, or something like that, after that time to keep a record of it.

Q. And you began keeping the hours?

A. We began keeping the hours.

Q. Now, did you make any change in the way you paid the men by the piece?

A. No, sir; we continued to pay them on the piece rate.

Q. Now, you have been asked if for some period before that, you had worked the men some of the time on an hourly basis and paid them on an hourly basis?

A. For doing the stacking?
Q. Yes.
A. Yes; there was one period in there when they were paid on the hourly basis.
The COURT. You mean before you received this bulletin or after?
The WITNESS. It was before the bulletin was received.

By Mr. BALL:

Q. Why did you change back to the piece rate, do you know?
Mr. STEED. We object to that question, Your Honor.
The COURT. If he knows, he may answer.
A. That did not come under my department.
The COURT. If you don't know, don't state it.
The WITNESS. Because the stackers refused to work on the hourly rate.

By Mr. BALL:

Q. Is that your understanding?
Mr. STEED. Your Honor, we object to that and move to exclude it, unless he knows.
The COURT. The objection is sustained.

By Mr. BALL:

Q. During the period that the men worked by the hour they were paid by the hour, and if they worked any overtime, were they paid time and a half for the overtime?
A. They were.
Q. Now, during the time that the men were paid on the piece rate, was there a great deal of time during that period that there wasn't any overtime work, so that there was no reason to pay time and a half? Is that true?
Mr. STEED. We object to that. The record of that is the best evidence.
The COURT. The records, of course, will speak for themselves on that.
Mr. BALL. All right, but I would like to ask him these questions about different periods.
The COURT. I sustain the objection. I think that will be shown by the record.
Mr. BALL. We offer to show that, Your Honor.

By Mr. BALL:

Q. Now, Mr. Reese, I asked you to take some employees, some men, and some of the weeks from your records there, and make me a list of a few instances showing the amount, showing the number of hours worked, what the wage and hour

pay would be figured on an hourly basis, and write that figure down, and then write down opposite that the amount actually paid that particular employee for that particular time, and I will just say and ask you if this is the sheet that you prepared for me [exhibiting paper to witness].

A. (Examining.) That is the sheet.

Q. I will ask you if in other instances you show——

The COURT. You made that from the record?

The WITNESS. Yes, sir.

The COURT. Those records that were received as evidence.

The WITNESS. Yes.

By Mr. BALL:

Q. I will ask you first, if it was picked out at random from your records?

A. It was picked out at random from the records.

Q. I will ask you if there was a single instance that you found in there where the employees were paid less than the minimum under the Wage & Hour Law?

A. There was not.

Q. I will ask you if, on the contrary, in every instance the amount paid to the employee was not a little more than, or substantially more than the Wage & Hour rate?

A. Yes; it was.

Q. Now, would you just call off one or two examples of what the Wage & Hour rate would mean, in dollars and cents to the employee, paid in dollars and cents?

A. For the period?

Q. Just for that period of time, give us that and the name of the man?

A. J. Hauser.

Q. Now, for the hours worked in that instance, how would the Wage & Hour rate run on his pay?

A. It would be $31.51.

Q. And how much was he actually paid, $56.25?

A. Yes.

Q. In other words, nearly twice as much as the Wage & Hour rate?

A. Yes.

Mr. BALL. I will offer this in evidence.

(Marked "Defendant's Exhibit 1" for identification.)

The COURT. The records are in evidence, and if they want to rebut it, they may do so.

Mr. BALL. All right, come down.

Redirect examination by Mr. STEED:

Q. Now, Mr. Reese, I would like you to explain to the Court just what you mean under the Wage & Hour Law, how did you arrive at those figures?

A. How did I arrive at those figures?

Q. Yes.

A. This is the minimum rate of pay for common labor under the Wage & Hour Law.

Q. In other words, figured on the basis of 30¢ an hour and time and one-half for all hours worked in excess of forty?

Mr. BALL. It is 35¢.

Q. 35¢.

A. He worked 94 hours on the two weeks' payroll, and that would be 14 hours overtime.

Q. That is the bare minimum?

A. Yes, sir.

Q. Now, I would like you to clarify one thing. You pointed out to the Court that the records contained this information.

Now, as a matter of fact, here is a week, for example, April 6th, 1942, in which you show what he would be entitled to under the Wage & Hour Law at the bare minimum, and what he was actually paid at the piece rate basis.

Now, as a matter of fact, didn't you testify in your direct examination that you did not start maintaining such duplicate records until about May of this year, or after this suit was filed; so this, then, is not contained in your records, is it?

A. The total hours is contained on the records.

Q. Yes; that is right, but it is the Wage & Hour rate.

The COURT. This is, of course, subject to admissions which come from the record?

Mr. STEED. Yes; but I simply wanted to clear that up in my own mind, Your Honor.

Q. But, did you actually figure what this employee would be entitled to during the workweek, if he were paid overtime on the basis of forty hours, on the basis of what he actually earned, what these particular rates would be? You figured what he would be entitled to on the minimum basis of the Fair Labor Standard Act?

A. Yes.

Q. You figured here what he would be actually paid under the piece rate basis?

A. Yes.

Q. Now, did you ever figure out what this employee would be entitled to on the basis of dividing the earnings by the hours

and getting his regular rate of pay and pay time and one-half on that basis?

A. You say did I consider it?

Q. Yes; have you ever thought how much he would be entitled to in addition to this $29?

A. No, sir.

Q. In other words, of this here you must figured out any basis on that so long as he got earnings which amounted to at least 35¢ an hour?

A. Yes.

Q. But you never figured out how much would be paid on the basis of the total hours during that workweek, did you, and this memorandum does not purport to establish what he would be entitled to on that basis, does it?

A. No, sir.

Mr. STEED. That is all.

Re-cross-examination by Mr. BALL:

Q. The attorney asked you if a man worked on the stacking basis, and then he went over into the mill and maybe worked some in the mill, he asked whether you considered that man's time over all that week, and it was not clear whether you considered the man's time over all or not, or whether you differentiated the hours he worked as a stacker?

A. If the hours he stacked, if during that period they were paid on the piece rate, he was paid on the piece rate, and the job in the mill was a 40¢ job, he was paid an hourly rate of 40¢ an hour. These figures were then added together and he got one check for the amount of both of them.

Q. One check for the whole thing?

A. Yes.

Q. Was there much of that, or was that just a rare occasion?

A. It was a rare occasion when stackers came into the mill.

Mr. BALL. All right; that is all.

The COURT. You may be excused.

(Witness excused.)

JAMES H. OGLE, a witness for and in behalf of the plaintiff being duly sworn, testified as follows:

Direct examination by Mr. MCGUIRE:

Q. Is this James H. Ogle?

A. Yes, sir.

Q. Mr. Ogle, are you employed by the Wage & Hour Division of the Department of Labor?

A. Yes.

Q. In what capacity?

A. I am Inspector in charge for the State of Alabama at the present time.

Q. Located at Birmingham?

A. Yes.

Q. How long have you been Inspector in charge?

A. Since November of this last year.

Q. When did you first go with the Wage & Hour Division?

A. November 1940.

Q. In what capacity did you go with them then?

A. I was an inspector.

Q. Were you an inspector with them up until the time you were made inspector in charge?

A. Yes.

Q. Before you went to work with the Wage & Hour Division in November 1940, were you connected with the Internal Revenue of the United States?

A. Yes, sir.

Q. The Department of Internal Revenue?

A. Yes, sir.

Q. In what capacity?

A. I was a Deputy Collector in the Birmingham Office.

Q. And did you make investigations and check records in that capacity?

A. Yes, sir.

Q. When did you go to work for them in that capacity?

A. That was about 1937. I worked for them about three years.

Q. Now, in all of the work you have just described with the Internal Revenue and with the Wage & Hour Division, did you make investigations and check records and check statements and analyze books and records of various concerns?

A. Yes.

Q. Have you ever made an inspection of Youngerman-Reynolds Hardwood Company, Incorporated?

A. Yes.

Q. When did you first—how many inspections did you make?

A. One.

Q. When did you first start on that inspection?

A. That was in September 1942.

Q. About how long did you spend, in all, the entire time, on that inspection?

A. About three weeks all together, I believe. It was scattered over a period there.

Q. In connection with that inspection, did you spend some of the time, or not, checking supplies of the defendant for its saw...ills?

A. Yes.

Q. You did not spend any time checking them alone?

A. No, sir.

Q. During the course of that inspection did you examine these records that have been marked and identified and are now in evidence?

A. Yes, sir.

Q. Did you check and inspect daily book, time books, that were said to have been kept down at Samson?

A. Yes.

Q. Did you also check the daily time sheets that were made up down there and are said to have been sent to Montgomery?

A. Yes.

Q. And did you check the permanent payroll records?

A. Yes.

Q. Do you identify those records there as the ones you checked?

A. Yes.

Q. Those records are now in evidence?

A. Yes.

Q. Mr. Ogle, are you familiar with the record keeping regulation or requirements, that his Honor has taken judicial notice?

A. Yes.

Q. Is that a copy of them?

A. Yes.

Q. Will you state to His Honor what those requirements are?

Mr. BALL. They speak for themselves, Your Honor.

Mr. MCGUIRE. Unless the Court wants them in.

The COURT. Unless there is some particular detail you want to call my attention to.

By Mr. MCGUIRE:

Q. Will you state to His Honor what your inspection discloses with reference to whether the records kept by the defendant corporation measure up to those requirements, and, if not, how they were delinquent or failed to show or to meet those requirements?

A. Well, they did not show the full name of the employee, their home address——

The COURT. A little louder, please.

The WITNESS. They did not show the full name of the employee, their home address, their occupation; they did not

show the time at which the employee's workweek begins; they did not show the regular hourly rate of pay and the basis on which the wages are paid for all employees. Over that certain period they did not show the hours worked each weekday or the total hours worked each week, each workweek, and they did not show the total paid at rate earnings or wages, and the total weekly overtime compensation.

Q. Some several days ago, when we had a pretrial conference, did you again check any of these records that are now in evidence?

A. Yes.

Q. Are they still lacking in any requirements?

A. I did not check them with respect to that.

Q. Suppose you get down on those and hastily look over several of them, so you can tell His Honor what they lack now?

A. On these daily time sheets?

Q. Yes.

A. Now, those were transferred, some of them, to the permanent pay roll record.

Q. I will ask you this: During what period of time did your inspection cover? When did you start the investigation?

A. In November 1942.

Q. Did you come back down to Samson in January 1943, at the time you took some statements?

A. Yes.

Q. Did you check any of these records along about that time?

A. Yes.

Q. Did they still fail to meet the requirements of the Administrator?

A. Yes.

Q. Now, prior to January 22nd and 23rd, 1942, did company keep the hours of the lumber stackers at all?

A. No, sir; not prior to January 1942, for the period of time I checked the record.

Q. Now, when you examined the records on September 2nd of this year, did you then find that *they* had been some change made in the way these figures were set out on the daily time sheets?

A. Yes; I found that there had been some changes, on inspection.

Q. Did you find them substantially as Mr. Reese has just testified about?

A. Yes, sir.

Q. In other words, you found one set of records and a duplicate set of records for the stackers?

A. Yes.

Q. Made sometime in May of this year, after the filing of this action?

A. Yes, sir.

Q. Is that right?

A. Yes, sir.

Q. Do you know an employee of the company by the name of John Taylor?

A. Yes.

Q. Do you know whether he has been stacking lumber for many years down there and is still stacking lumber for the defendant corporation?

A. Yes.

Q. Mr. Ogle, will you check, for the benefit of the Court there, the daily pay roll sheets for the month of January 1943, or two pay periods, or one pay period in January 1943, of John Taylor, and tell the Court what the records show as to the number of hours worked during those pay periods, and the amount paid that employee in January 1943?

Mr. McGUIRE. Would Your Honor give us a minute or two recess? We might be able to get along better.

The COURT. Yes; we will take a few minutes recess.

(At this point a short recess was taken.)

By Mr. McGUIRE:

Q. Mr. Ogle, I believe my last question was to take the pay roll period for the month of January, or one of those periods, and explain how John Taylor, a lumber stacker, was paid?

Mr. HALL. Did I understand you to say January of 1943?

Mr. McGUIRE. Yes.

A. The daily time sheets show for the period in January, ending January 23rd, that John Taylor ricked 76,600 feet at 60¢, for which he received $45.96, and that he flat stacked 8,000 feet at 70¢, a total of $5.60.

Q. And, does it show the number of hours worked?

A. No, sir.

Q. During that pay period?

A. No, sir; not on this sheet.

Q. Do you know any record which you can point out to His Honor showing the hours worked by John Taylor, whether it was 40, 50, 80, or 100 that week?

A. Yes, sir; I checked that back on the daily sheet every day.

Q. In analyzing that daily time sheet, can you state to His Honor on what basis he was paid, the hourly rate or the piece rate basis?

A. The piece-rate basis.

Q. And do those records, any of them, show whether he was paid for any hours over forty?

A. No, sir.

Q. At time and a half?

A. No, sir.

Q. Does that record show at all that he was paid any overtime beyond his regular rate of pay?

A. No, sir.

The COURT. I don't think there is any difference between you gentlemen that they were paying these people through a certain period strictly on a piece rate basis irrespective of the hours they worked.

Mr. BALL. That is true, because we admitted that all the way through.

The COURT. I want to ask Mr. Ogle one question just for my own information. Are there any instances where you found, in computing the compensation of the piece basis, that the amount that they received in a week would have been less than they received if they had been under contract work at the minimum wage at that time, plus any overtime they would be entitled to for overhours?

The WITNESS. You mean overtime at the rate of time and one-half?

The COURT. Would that in all instances have amounted to what the compensation would have been, or, the point I am getting at is, when they are working on a piece rate basis was the compensation less in any instance than it would have been if they had these employees employed at the minimum rate and then paid them overtime the minimum hours worked, time and one-half for overtime?

The WITNESS. No, sir; I don't think so.

The COURT. I thought that is the situation here, and I thought that is the basis on which they were operating at the time.

The WITNESS. As I recall it, there was one week, maybe, where one of these stackers had worked a number of hours at the mill at the minimum rate, and then a number of hours stacking, and during that one week he failed to receive enough, that is, the amount he received was not quite the minimum rate plus time and one-half his regular rate. That is the only one I recall.

Mr. BALL. Can you tell us what week that was?

The WITNESS. No; I cannot without looking at my notes.

Mr. BALL. We will be glad, if, during the day, you will find that and give that to us, if you will. The date, if you have it.

Mr. McGUIRE. We will do that. We will get it for you.

By Mr. McGUIRE:

Q. In line with His Honor's first question, did you ever find where an employee was paid the minimum wage rate for hours up to 40, and time and one-half that minimum rate for hours over 40, let me ask you this: Did you ever find that the amount he received would equal the amount due, or would not equal what was due, if you figured his pay at time and one-half his regular rate of pay, as pointed out in Interpretative Bulletin No. 4? Did you find that he would be due more if you figured his earnings on his regularly hourly rate of pay rather than by paying the piece rate?

A. Yes; he would be due more.

Q. Did you ever find any instances where the stackers, where they were paid at the piece rate basis, whether they received at least one and a half times their regular rate of pay?

A. No, sir.

The COURT. When you speak of their regular rate of pay, you mean the pay that would be found by dividing the minimum hours into the amount that they earned by stacking?

The WITNESS. I mean by dividing the total amount received by the total hours worked under the minimum rates. That is what I call the regular rate of pay.

By Mr. McGUIRE:

Q. What I asked you about John Taylor for January 1943, have you checked the records for recent weeks here to see in what regard they failed to meet the record keeping requirements?

A. They show about the same as the time that I was there in September and October.

Q. In other words, as I understand your testimony, they still fail to meet the requirements of the Administrator?

A. Yes.

Mr. McGUIRE. Now, in that connection, for the record, we would like to have him check, say for the week of September 7th, and state just what the records show in connection with their failure to comply with the record keeping requirements.

The COURT. All right.

The WITNESS. Here is the week ending September 4th.

Mr. McGUIRE. That is all right.

By Mr. McGUIRE:

Q. Does it show the hourly rate of pay of the lumber stackers?

A. No, sir; there are two of these attachments here.

The COURT. Wasn't it all on the piece basis?

Mr. McGUIRE. I want to bring out what records they are keeping, in line with the requirements, Your Honor. For instance, they do not show the man's home address, or his regular rate of pay, or his weekly rate of pay, or his overtime pay; what he received for overtime.

The COURT. Well, the Respondents, evidently all during that period, were laboring, probably, under a misapprehension of it, but they evidently thought if they had the men employed to work on piece work, they were not required to keep up with the hours. That was, evidently, the system they operated under.

Mr. McGUIRE. Yes; but I want to show, I think we can show, that they were aware of these record keeping regulations for over a year and a half and even now they failed with reference to keeping these requirements in their bookkeeping.

The COURT. In what particular?

Mr. McGUIRE. That is what I am trying to get him to tell, Your Honor.

The WITNESS. They do not show the home address of employees, they do not show the result segregation made as to the straight time earnings from any overtime earnings. This record here does not show the total hours worked during that period for the lumber stackers.

By Mr. McGUIRE:

Q. Does this record show that they received any overtime earnings?

A. No, sir; they did not.

Q. Does this record, do these records that we are now handling, and the ones you examined for September 4th, show the time or the date their workweek began?

A. No, sir.

Q. Do they show the basis upon which payment is now being made?

A. No, sir;—well, it shows they are paid on the piece-rate basis.

The COURT. It does show that they are being paid on a piece-work basis?

The WITNESS. Yes, sir.

By Mr. McGUIRE:

Q. Does it show the total daily hours and the weekly total of hours?

A. It shows daily, but there is no total here for the weekly hours.

Mr. BALL. Your Honor, I am going to move to exclude that testimony. There is no allegation in this case, if we refer to the complaint in this case, with reference to violation of the record keeping requirements. There is no charge about that. They do not show that we failed to keep the man's home address, and when he began to work or when he worked.

The COURT. There is a general allegation that you did not keep records.

Mr. BALL. No, sir; here is what they charge. They show that the defendant failed to—they say that the defendant failed to keep adequate and accurate records of its employees and of the wages, hours, and other conditions and practices of employment maintained by it, in that we failed to show, adequately, among other things, the hours worked each workday and each work week, the total straight time earnings for each work week, and the total weekly overtime excess compensation with respect to many of our employees. Of course, they don't show that, because we paid them on stacking. Now, if this is an examination to determine whether they kept a negro's home address and street address in the town of Samson, whether he worked, what time he started to work, and what time he quit, that is not charged in the complaint, and we move to exclude this.

Mr. McGUIRE. The records show that they failed to live up to all those requirements, and failed to keep adequate records.

The COURT. If you have not charged that in your complaint, there would be no purpose in offering proof of it.

Mr. McGUIRE. And Your Honor recalls the testimony that there was no record kept of these stackers before January 23rd, 1942, no record kept of the hours, and I want to go into that.

By Mr. McGUIRE:

Q. You agree with that, don't you, Mr. Ogle, that prior to January 23rd, 1942, no record of the hours worked by these stackers were being kept?

A. That is right.

Q. And you testified that no weekly total number of hours was kept on these stackers?

A. I don't see that, the weekly recapitulation sheets, where they paid them.

Q. Did you discuss the hourly rate of pay, as disclosed by these recent records, with any company official?

A. I beg your pardon?

Q. Did you discuss the hourly rate of pay, as disclosed by these recent records, with any company official?

A. Yes.

Q. With whom did you discuss it?

A. Mr. Logan.

Q. Who is Mr. Logan?

A. He is the plant superintendent down at Samson.

Q. Down at Samson?

A. Yes.

Q. What did he state with reference to these figures shown to you on these records as the hourly rate of pay for these lumber stackers?

A. Well, I asked him about one sheet that showed this rate, and one showed the hourly rate, and asked him what the hourly rate meant down there, and the hours that they had on their, since the records do not show that the employees were being paid on that basis, and he said that it had nothing to do with it, and that the stackers were paid a piece rate basis.

Q. To refresh your recollection, I will ask you if he stated to you that that did not mean anything; that they were not paying them that rate at all; that they were paying them on the piece-rate basis?

A. Well, I think he said it did not mean "a damsthing."

Q. That is right. Did you also discuss it with an employee of the Montgomery Office here on September 7th?

A. Yes.

Q. Who was that employee?

A. That was a new employee. He was not there at the time I was there before.

Q. Do you recall how long he had been there?

A. I believe since about the first of this year.

Q. Is his name Perry?

A. That is right.

Q. What did he state to you with reference to that payroll, or rather the hourly rate of pay, as far as shown on these records?

A. Well, he also said it did not mean anything.

Q. At that time, did Mr. Logan, or Mr. Perry state to you what the purpose was in showing the hourly rate on them, if it did not mean anything to them?

A. No, sir; I don't believe they did. I believe Mr. Logan said they started putting that hourly rate on there since I had been down there before.

Mr. BALL. Had been down there when?

The WITNESS. Before, since I made my inspection.

Mr. BALL. I thought you said you just made one inspection. What "before" do you mean?

The WITNESS. Speaking now of this month, the last time I was at Samson.

By Mr. McGUIRE:

Q. To refresh your recollection, I will ask you if Mr. Logan did not tell you that they were keeping that record of hourly rate of pay merely for their own information?

A. I believe that is right.

Q. After your inspection last Fall, did you discuss the violations found from your inspection either with Mr. Youngerman or Mr. Reynolds?

A. Yes.

Q. With whom did you first discuss it?

A. Mr. Reynolds.

Q. What did he state to you with reference to the company's method of payment of lumber stackers?

A. Well, he said they were paying the lumber stackers on the piece rate basis, and that in as much as the amount that they paid was equal to the minimum wage plus time and one-half the minimum wage, and after I had explained the regular rate of pay and his hourly rate of pay was arrived at by the division—how it was arrived at—he said it equaled the minimum wage plus time and a half the minimum wage.

Q. Did you furnish either of these two officials with any of the record keeping requirements?

A. I left a copy of the record keeping regulations there.

Q. Some two weeks after that, did you again have a conversation with both of the partners?

A. Yes, sir.

Q. Of both of the officers?

A. Yes.

Q. Did you again discuss the violations with them?

A. Yes.

Q. Relate what the conversation was?

A. Well, I explained at that time that certain of these suppliers who furnished them with lumber had——

Mr. BALL. We object to that, Your Honor, the suppliers are out.

The COURT. I thought you said there was no issue on that.

Mr. STEED. That is right. Leave out the suppliers.

The WITNESS. Well, there had been statements with respect to their violations and I explained that these had occurred with respect to suppliers, and that if the lumber was shipped in interstate commerce it constituted violation of Section 15 (A) (1) and, as I recall, Mr. Reynolds stated they had several war contracts and would like to go ahead, and the only thing I could do was to advise him of his liability.

Q. Did you discuss with either of them their future actions with reference to the violations you found?

A. Yes; it was just before the Alabama-Tennessee game, and both of them came into Birmingham, and I believe both Mr. Reynolds and Mr. Youngerman were coming to the game and I suggested they come by the office and talk with Mr. Gounsoulin.

Q. Who was Mr. Gounsoulin?

A. He was the supervising inspector.

Q. Did you tell them you would like to discuss it with them in Birmingham?

A. Sir?

Q. Was it made known to them what you would discuss in the office at Birmingham?

A. Yes; I told them they might talk to him and make arrangements whereby they might ship lumber.

Q. And did they ever show up in Birmingham?

A. No, sir.

The COURT. Gentlemen, we must get along a little faster on the examination of these witnesses. You are taking up a lot of time on matters that are perfectly clear to this Court, and on which there is no controversy. These people were paying these stackers at the piece rates and not on the hourly rate. That is clear——

Mr. MCGUIRE. Your Honor, we have to make a record.

By Mr. MCGUIRE:

Q. On September 8th, when you were down at Samson, did you discuss with Mr. Logan whether there was any guaranteed sum of money, any sum or weekly salary guaranteed to these lumber stackers?

A. Yes.

Q. What did he say to that?

A. He said that there was no guarantee.

Q. And that was already, after you had stated, or I will ask you if it was after he stated there was no agreed hourly rate

for the employees, and they were being paid on piece rates and not by hours?

A. Yes.

The COURT. Mr. McGuire, is it your contention here that there was a violation of the law because these people were paying piece rates, and were not in any sense figuring out the hourly rate and paying for overtime? It is perfectly clear that is what they were doing. The Respondents will not dispute that, as I understand that.

Mr. MCGUIRE. I don't know what his position is going to be, whether it is going to be that or not, but at the pretrial conference he said he had an implied agreement with these stackers.

Mr. BALL. We still say that when we made the agreement with the stackers it is implied that part of that money covers the overtime, but we have never said it was an expressed agreement, but implied, and we have not shifted our position one inch in this case.

The COURT. They have not specified any contract.

Mr. STEED. Your Honor, the evidence relating to the hourly rate depends on that duplicate set of records which began in May after the suit was started. They prepared and set up those records then.

The COURT. And then it is clear that this company continued to pay them at the piece-rate basis, and they have not, even to this date, paid them on an hourly basis.

Mr. MCGUIRE. We want for the record to show that that hourly rate was void, and did not mean anything, and to show that the manager of the plant stated it did not mean anything.

Mr. BALL. We did not say we paid them on an hourly rate, we say we kept a record of the hours they worked, but paid them on the piece-rate basis.

The COURT. And the government insists that that is the basis upon which they paid them, but after this controversy arose, I take it probably for the purpose of matters being adjudicated against them, that you have to base your record on how they were paid. There was no issue on that. It is not claimed by the Respondents now that they at any time paid them on an hourly basis.

Mr. STEED. Judge, I understand you are not now contending that was an advance.

The COURT. Well, they may call it an advance. It is a payment to the men.

Mr. BALL. We kept it that way and did not transfer it to our permanent record. In other words, it was an advance. We held it in abeyance and could not pay it.

The COURT. It is the plaintiff's contention that under Administrator's ruling you were required to reduce these earnings to an hourly basis, or divide them into the amount of hours they worked in a given week. I think your case is made out on that feature of it.

Mr. MCGUIRE. You may take the witness.

Cross-examination by Mr. BALL:

Q. Mr. Ogle, in your complaint, you say the defendant failed to show adequate hours worked each work day and each work week. Now, that is not true, is it? The records do show the number of hours worked each day by each employee. That is correct, isn't it?

A. Over a certain time.

Q. Well, for a certain time. How much time?

A. I think since January 1942.

Q. Since January 1942, it showed, hasn't it?

A. Yes, sir.

Q. Do you attempt to say that prior to January 1942 the records did not show that information, that is, the number of hours worked?

A. Yes.

Q. I wonder if you would mind taking the records and looking at them for October 1940 and see if you still make that statement?

A. All right, sir.

Mr. MCGUIRE. Mr. Ball, you mean as to stacking?

Mr. BALL. As to stacking. That is what we are talking about.

The WITNESS. October 1940?

By Mr. BALL:

Q. October 1940?

A. This daily time sheet shows; yes.

Q. So the records do show in October 1940, despite your statement to the contrary just now, that our records do not show the hours there in October 1940?

A. Yes.

Q. Will you look at the sheets along about August 1940 and see if you find we did not keep records then?

A. Yes; this is in August, it shows that.

Q. Then, it shows that we kept the number of hours at that time. Now, let us go the other way and see about February of 1941. Will you see along about in that period?

A. February 1941?

Q. Yes.

A. When we get to February, to look back in the records and show where it fails to show the rest of the year——

Mr. BALL. Your Honor, he made a flat statement that we did not keep any hours prior to January of this year, and I want to show by the witness himself he doesn't know what he is talking about.

Mr. MCGUIRE. January 1942, not this year.

Mr. BALL. All right, I want to show in 1940 and one in 1941.

The COURT. The exact date is not material.

Mr. BALL. I will just pick out a sample of it, Your Honor.

The WITNESS. Well, over a period of time——

By Mr. BALL:

Q. Now, do answer the question about 1941? In February of 1941, if you please; sir?

A. Here is a day in February 1941 which shows—wait a minute, I don't see any lumber stackers on that sheet, but here is a day in February 1941 which shows the hours worked by the lumber stackers.

Q. All right, you have it shown in 1940, and have it shown in 1941, and you said it was shown in 1942 and 1943. Now, do you still say that our records do not show the hours worked in 1941?

A. Yes.

Q. You say that despite the records which show to the contrary?

A. For all periods worked in 1942——

The COURT. The thing that would be helpful to me is, let the witness point out where they failed to show the hours worked.

Mr. BALL. This is the plaintiff's witness, Your Honor. Let them show that.

By Mr. BALL:

Q. Mr. Ogle, you said that you made your first inspection back in September 1942. That was a few months before this suit was filed, that is correct, isn't it?

A. Yes.

Q. And at that time you say the records failed to show the amount we paid these men on the piece rate basis?

A. Yes.

Q. But they said right then they were paying their stackers on the piece rate basis?

A. Yes.

Q. And when did you first tell them that it was against the law to pay them on the piece-rate basis?

A. That was at a conference, I believe, here in Montgomery in October, the latter part of October, or the first part of November.

Q. So, in the year 1942, before this suit was filed, and a few months later, was the time you told Youngerman & Reynolds it was against the law to pay on a piece-rate basis?

A. The first that I told them; yes.

Q. Now, do you tell the Court how it is against the law to pay on a piece-rate basis?

A. Yes; that is our position in the matter.

Q. That it is against the law to work a man on a piece-rate basis; that is what you tell the Court?

Mr. McGUIRE. We object to this.

Mr. BALL. Wait a minute. Let him answer, please.

The COURT. Let him answer.

By Mr. BALL:

Q. Will you answer the question?

A. Will you repeat it, please.

Q. Do you tell the Court now it is against the law, the Wage & Hour Law, to pay men on a piece-rate basis?

A. No, sir.

Mr. McGUIRE. We object to that.

Q. Didn't you just say you told Mr. Youngerman it is against the law?

Mr. McGUIRE. Wait a minute, I want a ruling on that.

The COURT. That is the position the Wage & Hour people are taking in this litigation.

A. Judge, I don't mean it is against the law to pay piece-rate basis, but he can pay the piece-rate basis if he pays overtime according to the law, and the way it should be paid.

The COURT. Your contention is that they paid them solely on a piece-time basis, irrespective of the hours.

The WITNESS. No; on the straight piece time basis——

The COURT. The crux of this whole thing is whether the law will permit the payment of a piece-time basis, irrespective of the hours worked.

By Mr. BALL:

Q. I want to find out when was the first time you said to Youngerman and Reynolds that was the law, or your position? You say it was in October 1942, just a few months before this suit was filed?

A. Yes.

Q. So far as you know, since the Wage & Hour Law went into effect, since 1942, nobody had told Youngerman and Reyn-

olds that was the position of the Wage & Hour people. So far as you know, you never talked to them?

A. No, sir; I never talked to them.

Q. So far as you know, then, did anybody tell them in your presence?

A. No, sir.

Mr. BALL. I think that is all.

Mr. MCGUIRE. Your Honor, during the recess, I would like Mr. Ogle to check these records and get out what you said would help the Court.

The COURT. Yes; I would like for him to point out the date and the times they failed to keep record of the hours worked.

Mr. MCGUIRE. During the entire time?

The COURT. Well, any time you want to call attention to.

By Mr. BALL:

Q. Let me ask you, you said in your conversations with Mr. Logan down there last Fall that you said there was no guarantee of any specified amount to these men?

A. I stated weekly amount.

Q. And Mr. Logan told you at that time they were paying their stackers on the piece-rate basis, didn't he?

A. Yes.

Q. And that was the way it was figured?

A. Yes, sir.

Q. Now, when you asked him about these hours they were keeping records of, they said that did not mean anything to them, didn't they?

A. Yes.

Q. But they did tell you and show you they were keeping a record of the hours, didn't they?

A. Yes.

Mr. BALL. That is all.

Redirect examination by Mr. MCGUIRE:

Q. These daily time records, are they made up down at Samson, at the Samson Plant?

A. Yes, sir.

Q. Do they prescribe on that record down there the hourly rate of pay, or whatever rate of pay is put on up here in the Montgomery Office?

A. You mean——

Q. For the lumber stackers?

A. There was no hourly rate of pay shown anywhere for the lumber stackers. Are you speaking of the last one?

Mr. BALL. We object to that, we admit they were paid not on the hourly rate, but the piece rate.

The COURT. Stand aside, Mr. Ogle.

(Witness excused.)

The COURT. Call your next witness.

ED HALL, a witness for and in behalf of the plaintiff being duly sworn, testified as follows:

Direct examination by Mr. McGUIRE:

Q. Is this Ed Hall?

A. Yes.

Q. Where do you work?

A. Leland Sawyer.

Q. Did you ever work for Youngerman-Reynolds?

A. Yes.

Q. Down at the Samson Plant, at their sawmill yard?

A. Yes.

Q. When did you work; when did you first start working for them?

A. In 1936.

Q. When did you last work for them?

A. About a month and a half ago.

Q. Who talked to you when you first went to work in 1936?

A. Mr. Willette.

Q. Mr. who; Mr. Willette?

A. Jesse Louis Willette. He was contracting the swamp then, and I was working in the swamp.

Q. Is he the man that runs a store across the street from the plant?

A. That is right.

Q. What kind of work did you do there at the plant for the company the first two years?

A. Well, I worked in the swamp.

Q. When did you begin working at the Samson Plant?

A. 1938.

Q. What part of 1938?

A. I think it was in August when I went down there.

Q. What type of work did you do when you first started working in the Samson Plant?

A. Well, I was working on the green chain.

Q. In the yard?

A. No, sir; in the sawmill. That was the first work I done down there, on the green chain.

Q. How long did you work down there?

A. About two weeks.

Q. Then, what did you do after that?
A. Then, I went to loading lumber there.
Q. Did you ever stack any lumber for the Samson Plant?
A. Yes, sir.
Q. How long did you stack lumber for them?
A. A year and a little bit.
Q. When did you begin stacking lumber?
A. July was a year ago.
Q. Did you work steadily from July until you quit, stacking lumber?
A. Yes.
Q. You were a lumber stacker?
A. Yes.
Q. You were not working around the swamp?
A. No, sir.
Q. Who hired you to stack lumber?
A. Mr. Logan.
Q. Is Mr. Logan the plant manager down at Samson?
A. Yes.
Q. And did he tell you how he would pay you when you were first hired to stack lumber?
A. Yes.
Q. How much?
A. 60¢ for ricking and 70¢ for stacking.
The COURT. That is 60¢ and 70¢ per thousand feet?
Mr. McGUIRE. Yes.

By Mr. McGUIRE:

Q. And who worked with you on stacking lumber?
A. When I first started stacking, Joe Brady Hauser.
Q. Who next worked with you?
A. Eugene.
Q. Eugene Cole?
A. Yes.
Q. Was Eugene working the full time with you stacking?
A. He worked up until about a month ago.
Q. Did you ever get paid for stacking lumber by the hour?
A. No, sir.
Q. Now, did you ever talk to Mr. Logan about raising the price for stacking?
A. We were getting paid by the thousand, and then, he promised us a raise.
Q. Did he tell you, did you tell him you wanted to stack by the hour?
A. Yes, sir.

Q. What did he tell you?
A. To stack by the thousand.
Q. Were you ever given a raise from 60¢ to 70¢ a thousand?
A. No, sir.
Q. Who promised you a raise? You said something about Mr. Logan said he would give you a raise?
A. That was about pay day, about a week or two before I quit.
Q. In other words, Mr. Logan promised you a raise from 60¢ to 70¢ and from 70¢ to 80¢?
A. That is right.
Q. That was just before you quit?
A. Yes.
Q. Did you ever get that raise?
A. No, sir.
Q. Did you ever agree with Mr. Logan, or any official of the company, what your hourly rate of pay would be for stacking lumber? Have you ever been paid by the hour for stacking?
A. No, sir.
Q. In lumber stacking work did you ever work over 40 hours a week?
A. Yes.
Q. Did you ever get any extra pay for the hours you worked over forty?
A. No; I don't know nothing about it.
Q. I will put it this way: Did you ever receive any more pay for the hours you worked over forty in any work week, or, say, you worked fifty hours or sixty hours in a work week, for those longer hours, or for the twenty hours over forty, did you receive any extra pay?
A. No, sir.
Q. You still got paid so much per thousand, did you?
A. Yes.
Q. In other words, regardless of the number of hours worked, whether you worked just a few hours, whether you worked the regular hours in the work week, you got paid the same rate of pay, didn't you?
A. Yes, sir.
Q. And during the time that you stacked in July of last year, and until the time you quit in June of this year, were you paid the same way?
A. Yes.
Q. Did the company, Mr. Logan or any of them, ever guarantee you a weekly salary for stacking lumber?
A. No, sir.

Q. Did they ever guarantee you a minimum amount of money for stacking lumber in a week, regardless of the number of hours you worked?

A. No, sir.

Q. This amount that you received, 60¢ or 70¢ for stacking lumber, did you keep that yourself, or did you split it with somebody?

A. That was split.

Q. Split between you and your helper?

A. Yes.

Q. In other words, if you were stacking lumber, you and your partner, if you were stacking or ricking, you split the 60¢ and you got 30¢ and he would get 30¢?

A. That is right.

The COURT. In other words, was the helper employed by you or by the company?

The WITNESS. The company.

The COURT. And they paid the money, they paid you.

The WITNESS. Yes.

By Mr. McGUIRE:

Q. Did you ever sign a contract with the company with reference to what your regular rate of pay would be for your work down there?

A. No, sir; I don't think I have.

Q. Let me make that clear: Did you ever enter into an agreement with the company to work for so much per hour?

A. By the hour?

Q. That is for stacking lumber; yes. Did you ever agree with them to work by the hour stacking lumber?

A. If I cannot get a better raise on the thousand, stacking lumber, I would rather stack by the hour.

Q. Well, did you ever enter into a contract with them to actually receive that money, did you ever agree with them to get paid by the hour?

A. No, sir.

The COURT. Did you work by the hour?

The WITNESS. No, sir; I never worked by the hour.

The COURT. You worked by the day, or so much per thousand?

The WITNESS. Yes.

The COURT. You are taking a great deal of time, gentlemen, by this witness, to prove exactly what is perfectly clear and admitted on both sides in this case. I guess you could have a dozen more here to prove the exact thing.

Mr. McGUIRE. Yes, sir; that is along the same line, Your Honor. They said they got a contract yesterday morning, and that is what I want to find out.

The COURT. You may ask him that.

By Mr. McGUIRE:

Q. You are not working there now, I understand?

A. No, sir.

Q. Did you ever sign any kind of a contract to stack lumber by the hour?

A. I signed some papers.

Q. Do you know what that was?

A. I can't read.

Q. They read it to you?

A. Yes.

Q. What did it say?

A. To stack by the thousand rather than by the day.

Q. Did anybody say, was anything said about how you would be paid for stacking?

A. They said they wanted to prove I got paid overtime.

Q. Did you ever talk to Mr. Logan or any of the officials about paying for the extra hours worked over forty hours a week?

A. I never talked to Mr. Logan about it.

Q. Anybody else connected with the company?

A. Mr. Daniels.

Q. Did you get paid for the week's work, or just 40 hours?

A. No, sir; I couldn't tell until I worked. I was getting paid by the thousand feet.

Q. During the weeks you stacked lumber did you also work on the yard during the same week, or in the mill?

A. On the yard?

Q. Or in the mill, did you work other than stacking lumber? What I am getting at is, did you stack lumber part of the week and do other work around the yard during that week?

A. No, sir.

Q. You stacked all the time?

A. Yes.

Q. Up until July of last year, before you went to stacking lumber regularly?

A. Only by the day.

Q. What were you paid by the day?

A. 35¢ an hour.

Q. 35¢ an hour?

A. Yes, sir.

Q. And did you get overtime pay when you worked over 40 hours a week?

A. Yes.

Q. Now, during the time you received 35¢ an hour for working on the yard, did you also stack lumber during that week?

A. No, sir.

Q. Did you stop working for the company in June on your own accord, or were you discharged?

The COURT. What difference does that make?

Mr. BALL. Your Honor, we object.

The COURT. He quit and is not employed any longer. It makes no difference whether he was discharged or quit.

Mr. MCGUIRE. It does; it is to show they refused to pay him by the hour and they were all being paid at the piece rate down there.

The COURT. If they could not employ them under the law, it does not make any difference what the company did about it.

By Mr. MCGUIRE:

Q. When you left the company, do you have a statement or an accounting showing whether they owe you more money, or you owe them?

A. I believe I had enough pay coming from the lumber stacking to pay up at the store, to Mr. Jesse; I worked 5½ days and made $13.50.

Q. Did the company ever advance you any money?

A. Sometimes I could get it and sometimes I couldn't.

Mr. BALL. Your Honor, there is nothing like that charged in the bill of complaint; I object.

The COURT. I sustain the objection. You may have your exception.

Mr. MCGUIRE. Your Honor, he was talking about a different kind of advance than the one Mr. Ball has been talking about. He was talking about advances from the store. Now, I want to clear that up to show it was not an advance that he claims has been made under this new set-up on the books. If that is admitted, I will stop right there.

The COURT. I don't see that it would make a *particular* of difference whether it was or not. If you will just keep your mind on the legal propositions before us, and not on these immaterial matters of fact that are without dispute.

Mr. MCGUIRE. That is all.

Cross-Examination by Mr. BALL:

Q. Now, Ed, you cannot read or write?

A. No, sir.

Q. You cannot sign your name?

A. I can sign my name.
Q. You can sign your name, but you cannot read?
A. Yes.
Q. Now, during the time you worked as a stacker for Younger and Reynolds you were paid per thousand pieces, weren't you?
A. Yes.
Q. Was that the way you wanted to work?
A. Well, that is the way the rest of them was working.
Q. Isn't that the way you wanted to work?
A. I did then.

The COURT. What difference does it make whether he wanted to work that way or not? If the law permits people to work that way, and they worked that way, even though it is on a verbal contract, they have the right to do so, but if it does not permit it, then, he could not evade the law by being willing or unwilling.

By Mr. BALL:

Q. Did you sign this paper, Ed?
A. No, sir.
Q. That is not your signature?
A. No, sir.

Mr. BALL. You may come down. Your Honor, in order that I may identify the paper which the witness denies signing, I would like to have it marked for identification only as "Defendants' Exhibit 2."

(Marked "Defendants' Exhibit 2," for identification.)

Redirect examination by Mr. McGUIRE:

Q. Ed, you say you did not sign that paper. Look at it good.

Mr. BALL. We object to that, Your Honor. The witness looked at it and said he did not sign it, and the plaintiff's attorney is trying to get him to admit it and say he did sign it.

Mr. McGUIRE. There are two names on it.

The WITNESS. I signed the top one, but not the bottom thing.

By Mr. McGUIRE:

Q. You did not sign this "Ed" here, but you did sign this "E. J. Hall"?
A. Yes.

Mr. BALL. Is that "E. J. Hall" your writing?

By WITNESS. Yes.

Mr. McGUIRE. Is that "E. B." or "E. J."?

The WITNESS. E. J.

The COURT. Then, you signed the paper?

The WITNESS. Yes.

Mr. BALL. We offer the paper.

Mr. McGUIRE. We object.

The COURT. I don't know that it is material. I will have to see it before I pass on it.

Mr. McGUIRE. The reason I am objecting to it, Your Honor, is you said you did not know that it would make any difference as to what he wanted to do.

By Mr. McGUIRE:

Q. Do you know what is in this paper?

A. No, sir.

The COURT. You say you don't know what was in that paper?

The WITNESS. No, sir.

The COURT. You did not read it or have it read?

The WITNESS. I cannot read.

The COURT. Did you keep any record of the amount of lumber you stacked yourself, you and your partner?

The WITNESS. I had 14——

The COURT. Did you keep a record of those?

The WITNESS. I did; but they got burned up.

The COURT. How is that?

The WITNESS. I did; but they got burned up.

The COURT. I don't think that part of it, where he is willing to work any other way, I don't think that part is material in connection with his whole testimony.

By Mr. McGUIRE:

Q. Will you tell His Honor how the stackers keep up with the amount of lumber stacked?

A. We count them, we have so many layers that we stack.

Q. And do you turn that in everyday?

A. Turn it in every two weeks, the amount we stacked every day.

Q. And do you keep that yourself?

A. Yes, sir.

Q. And you turn that in every two weeks?

A. No, sir; when he come around and check it every two weeks.

Q. Doesn't he come around and check it every day or every week?

A. No, sir; every two weeks.

Q. Then, he does check the records himself?

A. I think that is what he do.

Mr. McGUIRE. That is all.

Re-cross-examination by Mr. BALL:

Q. Ed, did you sign this paper too? [exhibiting paper.]

A. Yes.

Mr. BALL. We offer it.

Mr. McGuire. I object to it on the same grounds, Your Honor. It is immaterial and irrelevant in this action.

The Court. I sustain the objection.

Mr. Ball. We except.

(The paper in question was marked "Defendants' Exhibit 3," for identification.)

The Court. Call your next witness.

Bob Noye, a witness for and in behalf of the plaintiff being duly sworn, testified as follows:

Direct examination by Mr. McGuire:

Q. Is this Bob Noye?

A. Yes, sir.

Q. Where do you work, Bob?

A. I work for Youngerman-Reynolds.

Q. How long have you worked for them?

A. Practically all my days.

Q. Did you ever stack lumber for them?

A. Yes.

Q. When did you first start stacking lumber?

A. Well, I don't recollect, but I have been stacking a pretty good while for them.

Q. When did you stop stacking?

A. Well, I stopped stacking about five months ago, after they put me t another job where I made more money.

Q. You are still with the company?

A. Yes, sir.

Q. What is your rate of pay now?

A. 50¢ an hour now.

Q. And you work in the sawmill, don't you?

A. Yes.

Q. When you stacked lumber, Bob, were you paid by the hour like you are being paid now for your work, or by the stack, by the thousand?

A. I stacked by the thousand.

Q. What did you get when you first started stacking lumber per thousand?

A. 60¢ a thousand.

Q. Did you ever agree with the company to stack lumber by the hour?

A. I have not.

Q. Did you ever receive any overtime pay when you were stacking lumber for hours that you worked over 40?

A. If I did, I don't remember it.

The COURT. Did you ever stack lumber by the hour?

The WITNESS. I have not.

By Mr. McGUIRE:

Q. That 50¢, you stated awhile ago, that is for work in the mill?

A. That is for running the edger in the mill.

Q. And when you stacked lumber for more than 40 hours a week, you still got the same rate of pay per thousand?

A. Yes, sir.

Q. Did you get any extra pay for overtime?

A. If I have, I don't recall it. I couldn't say that no way.

Q. So, you did not get time and one-half——

The COURT. I understand the defendants claim they did not at any time pay for stacking on a piece basis any extra for hours put in as overtime.

Mr. BALL. That is right, Your Honor. He is just proving what we have admitted about nine times in the case.

By Mr. McGUIRE:

Q. Do you get time and one-half pay for your overtime work in the mill?

A. Yes, sir; I do now.

Q. You are not stacking now?

A. No, sir.

Q. Did you ever get any extra time, extra pay, for stacking lumber?

A. I have not.

Q. Did the company, or any of its officials, ever agree with you to pay you a certain salary per week for stacking lumber?

A. A certain salary per week?

Q. Yes.

A. No, sir.

Q. Did you have any certain set hours of work for the company while you were stacking lumber?

A. No, sir.

Mr. McGUIRE. Take the witness.

Cross-examination by Mr. BALL:

Q. Bob, did you work on your own time when you were stacking?

A. What do you mean "by my own"?

Q. Well, did you work when you got ready and quit when you got ready?

A. Well, we were stacking by the thousand, and we were supposed to get that amount regardless of how long or how short.

Q. And you could come on the job when you got ready, and you could leave the job when you got ready?

A. Regardless, if the yard was in shape.

Q. And you were paid by the piece, is that the way you were paid?

A. Yes.

Mr. BALL. That is all, you may come down.

Redirect examination by Mr. McGUIRE:

Q. Bob, when you stacked lumber, or when you stopped stacking lumber, did you have settlement with the company about whether they owed you money over what they had advanced you for stacking lumber?

A. No, sir.

Q. Did you ever receive any advances from the company for stacking lumber?

A. No, sir; I haven't seen none of it.

The COURT. It is perfectly clear that that new system that they had put into effect was devised only to be an advance of payment, until they could ascertain if they were under a duty to pay differently, until they could find out.

Mr. STEED. If the Court please, in that connection, if they continued to pay on the piece-rate basis and had another set of records where they kept the time basis, and Mr. Ba'' suggests that, that is their position, I think it competent to show what the method was.

The COURT. What difference does it make whether you call it an advance or payment, if they did not pay any more?

Mr. BALL. As a matter of fact we paid the men by the piece, and kept the hourly records so that we would know, but we don't claim we paid them on the hourly basis and kept no record on the hourly basis.

(Further discussion off the record.)

The COURT. All right, let's get along. Are there any further questions to this witness?

(No response.)

The COURT. You are excused. Please step aside.

(Witness excused.)

CLIFTON HOLMES, a witness for and in behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. McGUIRE:

Q. Is your name Clifton Holmes?

A. Yes.

Q. Clifton, are you still working for Youngerman-Reynolds?

A. Yes.

Q. How long have you been working at the Samson Plant?
A. A little better than two years.
Q. And you are still working there, you say?
A. Yes.
Q. Who is your foreman?
A. Mr. C. L. Daniels.
Q. He is your foreman down there?
A. Yes.
Q. What kind of work did you do when you first went to work there?
A. Day laborer.
Q. How long did you work at day labor?
A. I don't know, sir; about five or six weeks, I reckon.
Q. What did you get per hour for that five or six weeks as day laborer?
A. 30¢ an hour.
Q. And then you started stacking lumber?
A. I started stacking lumber.
Q. Who hired you to stack lumber?
A. Mr. Logan.
Q. When you first started stacking lumber how much did you get for it?
A. How was I getting paid?
Q. Yes.
A. By the thousand.
Q. How much per thousand?
A. 60¢.
Q. When did you first start stacking lumber?
A. 1942, I think. Yes, 1942.
Q. And you are still stacking?
A. No, sir; I ain't stacking.
Q. When did you stop stacking lumber?
A. Last week; some day last week.
Q. And did you get so much per thousand all during the time you stacked lumber?
A. Yes.
Q. And did you get that same amount if you worked over forty hours a week?
A. Yes.
Q. Did you get any extra pay for the hours that you worked over forty in any week?
A. No, sir; if I did, I don't know nothing about it.
Q. What are you doing now?
A. Working by the day.
Q. What do you get an hour now?

A. 45c.

Q. Do you get any extra pay for overtime?

A. I ain't made no overtime.

Q. Now, during the time you were stacking lumber, did you also work on the yard as a day laborer during the same week?

A. Only for a certain time when we were caught up with the lumber stacking.

Q. And when you worked by the day, when you caught up with the lumber stacking, did you get paid by the hour?

A. Yes, sir.

Q. As I understand it, you say you got paid for stacking lumber at the same rate——

The COURT. Whether he worked 20 hours a week or 50 hours a week, he got so much per thousand feet.

Mr. MCGUIRE. That is right.

By Mr. MCGUIRE:

Q. Did the company ever agree to pay you a salary each week for stacking lumber?

A. No, sir.

Q. Did you ever agree with the company, in writing or orally, what you would be paid for stacking lumber?

A. No, sir.

Q. Now, yesterday, was that the only time?

A. On yesterday.

Q. What did you agree on with them yesterday over there?

A. I don't know, sir, now. I can't understand it.

Q. Well, was it made plain to you? Do you understand it now?

A. Yes, sir; I understand some of it.

Q. Could you tell His Honor? Where did you get that paper, here in Montgomery?

A. Yes.

Q. Where did you go; to Mr. Ball's office?

A. I don't know, sir; I reckon I did.

Q. Can you tell us what was in that paper?

A. No, sir.

Q. Did you sign it?

A. Yes, sir.

Q. Did you make a contract of so much an hour for stacking lumber?

A. I worked so much an hour for stacking lumber——

Mr. BALL. Ask him——

Mr. MCGUIRE. Now, wait a minute.

Mr. BALL. Your Honor, I ask the privilege to ask the witness whether the contract he signed was in writing, and so, that would be the best evidence of what the contract was.

The COURT. Did you sign a written contract?
The WITNESS. Yes.
The COURT. Was it read to you?
The WITNESS. Yes.
The COURT. Do you think you understood it or not?
The WITNESS. Yes, sir; I understood some of it; I could not understand all.
The COURT. Do you think you understood how you were to get paid?
The WITNESS. Yes.

By Mr. McGUIRE:

Q. Can you tell us what your understanding was?
Mr. BALL. I object.
The COURT. I will sustain the objection to that question. He said it was read to him and he thinks he understood it. Besides, if the contract is legal, I don't think you can have any cross-examination on it. I will sustain the objection and grant you an exception.

By Mr. McGUIRE:

Q. Can you tell us what you are working for now?
Mr. BALL. We object. It is a matter of contract and it is in writing.
The COURT. I will sustain the objection.
(Argument.)
The COURT. I sustain the objection. You have your exception.
Mr. McGUIRE. That is all.

Cross-examination by Mr. BALL:

Q. Clifton, you were given a copy of the contract, weren't you?
A. Yes.
Q. And you put it in your pocket?
A. Yes; but I lost that one.
Mr. BALL. Well, I will give you another one. You may come down.
(Witness excused.)

JOHN TAYLOR, a witness for and in behalf of the plaintiff being duly sworn, testified as follows:

Direct examination by Mr. McGUIRE:

Q. Is this John Taylor?
A. Yes.

Q. John, you live down at Samson?
A. Sir?
Q. You live at Samson?
A. Yes, sir.
Q. Do you work for the Youngerman-Reynolds Corporation?
A. Yes, sir.
Q. How long have you been working for them?
A. I couldn't say how many years I have been working for them; about twenty some odd.
Q. You are still with them?
A. Yes.
Q. Are you stacking lumber down there now?
A. Yes.
Q. How long have you been stacking lumber at the Samson plant?
A. Five years; going on six.
Q. Who is the boss down there at the plant?
A. Mr. Logan.
Q. What do you get an hour for stacking lumber?
A. 70¢ and 80¢.
Q. A thousand?
A. Yes.
Q. Do you stack lumber by the hour?
A. No, sir.
Q. Did you talk to Mr. Logan about paying you by the hour for stacking lumber?
A. No, sir.
Q. John, do you get any extra pay for your work if you work forty hours a week or after you work forty hours a week, do you get any extra pay, than if you do work forty hours?
A. No, sir; the same.
Q. You get paid the same rate, do you?
A. Yes, sir.
Q. Whether you put in a 60-hour week, or whether you put in a 10-hour week?
A. Yes, sir.
Q. Did the company ever agree to pay you a guaranteed salary for a week's work regardless of the number of hours you worked?
A. No, sir.
Q. Did you ever agree with the company that the pay that you were receiving included the overtime pay?
A. No, sir.

Q. That is while you were stacking lumber?
A. No, sir.
Q. John, did you enter into this contract yesterday?
A. Yes.
Q. Do you know what is in it?
A. No, sir; I don't know.
Q. Do you know what you get paid under that contract?
A. No, sir.
Q. Can you read or write?
A. No, sir.
The COURT. Well, was the contract read to you?
The WITNESS. Yes, sir; I guess it was.
The COURT. Do you think you understood it or not?
The WITNESS. I understood some of it.

By Mr. MCGUIRE:

Q. Do you know whether under that contract you are to work for 20¢ an hour, 40¢ an hour, or 50¢ an hour?
A. I know what he is paying me.
Mr. BALL. We object to that, Your Honor. The contract is the best evidence.
The COURT. He says he knows what they are paying him. Let him state that.
The WITNESS. He said for stacking 70¢ and 80¢, and when we work on the yard, 35¢ an hour?
Q. You work on the yard for 35¢ an hour?
A. Something about 35¢ an hour.
Q. Well, did he guarantee any amount per hour?
A. 35¢.
Q. Is that what the contract says?
A. 35¢ an hour.
Q. Did you ever agree to work by the hour?
A. No, sir.
The COURT. Well, in the conversation yesterday did you understand that you were to get at least 35¢ an hour?
The WITNESS. Yes, sir.
The COURT. And didn't you understand as to whether you would get more than that if you worked more than the prescribed hours per week?
The WITNESS. Yes, sir.
The COURT. How much were you to get for overtime?
The WITNESS. They ain't said. They never said about the overtime.
The COURT. Did you ever work overtime?
The WITNESS. They ain't said about the overtime.

The COURT. Never said anything about that?

The WITNESS. No, sir.

By Mr. McGUIRE:

Q. John, did you ever stack lumber and also work around the mill yard on the edger during the same week?

A. No, sir; I ain't never worked about the plant a little bit.

The COURT. That is just as clear as it can be. If this man stacked lumber, worked at stacking lumber, he got the same rate, whether he worked 6 hours a week or 60 hours a week. That is true of all of these witnesses all the way through this hearing.

Mr. McGUIRE. We will be glad to stipulate that. We have other stackers here.

The COURT. I don't think you ought to take up the time of the Court by putting on all of these stackers.

Mr. BALL. If they are willing, we will stipulate they will testify to the same thing.

Mr. McGUIRE. We have the names and we will call them off to you. Lorenzo Pool.

Mr. BALL. Your Honor, he is in the Court Room. He could not testify if they put him on the witness stand. He has not been under the Rule.

Mr. McGUIRE. Clayton Carter.

Mr. BALL. We will stipulate that Carter will testify the same as the other stackers.

Mr. McGUIRE. Eugene Cole.

Mr. BALL. Cole is all right.

Mr. McGUIRE. I think that is all of the stackers.

The COURT. What else are you going to offer?

Mr. McGUIRE. The Court asked Mr. Ogle a question, and we are having him go through these records. I might possibly call another witness.

The COURT. We will adjourn now until 15 minutes after 2 o'clock.

(The Court thereupon recessed from 1 o'clock P. M. until 2:15 o'clock P. M.)

(The Court reconvened, pursuant to recess, at 2:15 P. M.)

JAMES H. OGLE, a witness previously sworn for the plaintiff, resumed the stand and testified further as follows:

Redirect examination by Mr. McGUIRE:

Q. I believe you were making some search of the records to point out to the Court certain instances which the records

did not meet the requirements of the Administrator. Will you tell us just what you found?

A. Well, I checked back on the records here, back to April 4, 1941, relative to the hours shown for the lumber stackers, and I found that from April 4th, 1941, through December 31, 1941, that there were no daily hours or weekly hours shown for the lumber stackers during that time.

Q. Is that as far as you checked?

A. I did not check back after April 1941, or rather I stopped checking a little—there were daily hours shown for the period prior to April 1941, but it seems to have stopped there, and then, for that period of time there were no daily hours or weekly hours.

Q. What else did you find?

A. As a matter of fact during the period from April 1941 through December 1941 the stackers' names are not shown on these daily time sheets at all. There is a sheet entered in there at the end of every two weeks which merely shows the stackers' names and the total amount received during that two weeks' period.

Q. Did I understand you to say, before the lunch recess, that the records never have shown the total weekly hours and that they just show the total daily hours?

A. That is right, the daily time sheets did not show the total hours worked by the stackers during the week.

Q. Is that up to date, or just up until May when they started this duplication system?

A. Well, when they started that other system, they are not shown on the time sheets.

Q. Are they shown on a piece of paper attached to it?

A. Yes.

Q. That is the daily as well as the weekly total hours?

A. No, sir; I don't believe, as well as I recall, I don't believe that the daily hours are shown for the stackers since May, really, on these daily time sheets. I don't recall that.

Q. How about getting down and looking to see if it shown since May, the total number of hours per week?

The COURT. Doesn't it show daily?

Mr. MCGUIRE. They show it daily.

The COURT. Well, if they show it daily, it would be purely a matter of computation to get it for the week.

By Mr. MCGUIRE:

Q. Do the regulations require that they total them up for the week?

Mr. BALL. We are not charged with failure to do that in the complaint.

Mr. MCGUIRE. We say, among other things, then, generally, we allege failure to keep daily hours and total weekly hours in the records kept for the men.

By Mr. MCGUIRE:

Q. Is there any segregation shown in any of these records for the amount of pay the lumber stackers received up until they worked forty hours, and that which they received after forty hours?

A. No, sir.

Q. Is there anything indicated on the record that the company has ever paid or attempted to pay overtime to these stackers?

The COURT. Mr. McGuire, that is just simply taking the direct over and over, and that is without dispute and it is absolutely admitted in the case.

Mr. MCGUIRE. We are submitting this as part of the record keeping requirements, Your Honor.

The COURT. That is if your theory of the case is correct; that is true.

By Mr. MCGUIRE:

Q. Is there anything shown on the record at all that they are being paid piece-time pay?

A. No, sir.

Q. Are the words "piece time" written on there?

A. No, sir.

Q. Is that one of the requirements of the regulations when they are paid by the piece rate, that that appear on the record?

A. Yes, sir.

Mr. MCGUIRE. That is all.

Re-cross-examination by Mr. BALL:

Q. Mr. Ogle, as I understand your testimony, you find a period of eight months, out of the five-year period from October 1938 down to now, you find a period of eight months in these records where they do not show the hours. Is that what you have just testified to?

A. I did not check back of April 1941.

Q. Well then, so far as you know, for the rest of the time they did keep the hours?

A. No, sir; they did not.

Q. Well, you just testified that during one eight months' period they did not keep the hours. That is what you testified?

A. Yes.

Q. In other words, you just found, did you, on an examination of all of these records——

The COURT. He said he did not check back of April 1941.

By Mr. BALL:

Q. How much did you check?

A. Just from April 1941, and I had gotten up to the first of 1942 when the Court went back in session.

Q. Now, since that time there is a sheet that showed piece work, is there?

A. Yes.

Q. And there is the name of each stacker on that sheet, is there not?

A. Yes, sir.

Q. The number of hours worked on that day is on that sheet, isn't it?

A. I believe it is, Mr. Ball, except since May, I don't recall whether since May stackers have been on the individual time sheet or not.

The COURT. He is asking, I take it, about this period of time you testified to, from April to December 1941, and I understood your testimony, and if I am in error about it I want to be straightened out on it, that the records during that time did not show any hours at all.

The WITNESS. No, sir; not with respect to lumber stackers.

By Mr. BALL:

Q. So that I am asking you if there is a sheet for each day's work separately, giving the name of the man and the number of hours he was entitled to?

A. There was from that time until I checked, but, as I say, I don't know whether it has been that way since May or not.

Q. Mr. Ogle, I want to get in my mind what you testified to a little while ago. You testified that the piece rate or the per thousand rate of pay was against or contrary to the Wage and Hour Law. Now, I want to get your testimony straight.

Let us suppose a stacker worked under an agreement that he be paid 60¢ a thousand for lumber stacking, and let us assume that he comes to the end of the week and he has worked 50 hours. Now, under his agreement to stack by the thousand, he stacked enough lumber so that they paid him on that basis that he was working under, the contract basis, $25.

Now, we come to the end of that week, and when it comes time to pay, and we have not paid him anything yet, we are there with the time sheets and the man is sitting there ready to get his pay check, and if it was not for the Wage & Hour Law,

we would pay him $25, but we just got that pamphlet here since and we want to figure out how much money to pay this man. Now, will you clear me up on how we should pay that man under those circumstances?

A. You say he worked 50 hours and was to get $25?

Q. No; he hasn't got anything yet, they have not paid him yet and we are trying to figure out how much to pay him. In other words, we cannot pay him on the piece-rate basis because we just got the law there and the requirements and we found we could not pay him on the piece-rate basis, but we want to pay the man, he is standing there waiting for his money, and but for the Wage & Hour Law we would pay him $25, but we cannot do that because the law says we cannot do it. Now, how should we pay that man?

A. You take the total amount of hours at the rate he would have received on a straight basis, which, in that case would [be] 50¢ an hour, and then you pay him 50¢ an hour for the first 40 hours and 75¢ an hour for all hours over 40.

Q. Now, that would figure to $27.50, wouldn't it?

A. Yes.

Q. So your position is that under the contract we had with this man, although he would have gotten $25, we cannot pay him $25 but that we should divide the $25 by the number of hours worked, and pay part of it one way and the balance of it another way, so he would get a larger amount than $25?

A. Yes.

Q. And if it was figured where we owed him 50¢ on the piece-rate basis, under your theory, we still owe him some more money, wouldn't we?

A. Yes.

Q. And if we paid him $1,000 or owed him $1,000 on the piece-rate basis for that week's work, under your theory we still owe him some more money, and if we paid him $1,000,000 for that week's work on the piece-rate basis, paid him a million dollars, we would still owe him some more money?

A. That is right.

Q. And that is what you are asking this Court to hold?

A. (No answer.)

Mr. BALL. All right, you may come down.

Mr. STEED. Your Honor, the plaintiff offers in evidence a copy of the regulations, Part 516, which are the record keeping regulations, and a copy of lumber and timber products, wage order, which I mentioned in my opening statement this morning, which became effective on November 7th, 1941, and which prescribes a minimum wage hour of at least 35¢ an hour, and

a copy of the Administrator's Interpretative Bulletin No. 4, which deals with the proper method of computing overtime compensation of piece workers, among other types of employees.

The COURT. Do you have any objection to them?

Mr. BALL. No.

(Marked "Plaintiff's Exhibits 5" in evidence.)

Mr. STEED. The plaintiff rests, Your Honor.

Mr. BALL. Your Honor, I would like to have that first Negro, Clifton Holmes, back. Bring him back, I want to ask him one other question.

CLIFTON HOLMES, a witness previously sworn for and in behalf of the plaintiff, recalled for further——

Cross-examination by Mr. BALL:

Q. Clifton, when you were paid on the per thousand basis, was that an agreement that you were working under?

A. When I was paid on the what?

Q. On the per thousand basis; so much per thousand feet that you stacked?

A. No, sir; I was working, I stacked by the thousand——

Q. I say when you were stacking by the thousand and you got paid by the thousand, were you paid according to the agreement that you had?

A. I don't know, sir; I reckon so.

The COURT. Did you agree to stack by the thousand?

The WITNESS. Yes, sir; that is the way I stacked, by the thousand.

Q. Was that the agreement between you and the folks that you were working for, that you were to be paid so much a thousand for the lumber you stacked?

A. Yes.

Q. Did they pay you according to that agreement?

A. Yes, sir; that is the way I was paid.

Q. And was that the way you worked all the time you were stacking lumber for them?

A. Yes.

Q. And I believe you said a little while ago that was for some considerable time, wasn't it?

A. Yes, sir.

Mr. BALL. All right, you may come down.

(Witness excused.)

The COURT. Each one of these witnesses on the stand testified that is the way they worked.

Mr. BALL. Your Honor, I am trying to bring myself within the Below case as near as I can.

The COURT. I think it has already been shown that that is the way they were working.

JOHN TAYLOR, a witness previously sworn for and in behalf of the plaintiff, recalled for further——

Cross-examination by Mr. BALL:

Q. John, let me ask you this: During the time you were stacking lumber down there for Mr. Youngerman, was it under an agreement they were to pay you so much a thousand?

A. Was there an agreement?

Q. Yes; was it agreed between you that they were to pay you; that that was the way you were to be paid?

A. Yes.

Q. Now, did they pay you on that basis?

A. Yes, sir.

Q. Did you ever ask to be put on an hourly basis?

A. No, sir.

Q. Did he suggest to you about putting you on an hourly basis and you said no, you wanted to be on a piece-rate basis?

Mr. MCGUIRE. We object to that.

The COURT. I don't see what difference it makes. If he has actually worked on a piece-rate basis and he agreed to work that way, I don't think it is necessary to show that he would like to work some other way. I don't think it would make any difference.

Mr. BALL. Your Honor, we want to show that the stackers were unwilling to work any other way.

The COURT. Well, if the law did not permit them to work on a piece basis, and this evidence shows they were working that way and were not willing to work any other way, the only escape for the employer was not to let them work at all.

Mr. BALL. Just quit and go out of business.

(Witness excused.)

G. C. YOUNGERMAN, a witness for and in behalf of the defendant being duly sworn, testified as follows:

Direct examination by Mr. BALL:

Q. Mr. Youngerman, you are the President of Youngerman-Reynolds Company, Incorporated?

A. That is correct.

Q. When was the first time that your company was inspected by the Wage & Hour People, to the best of your recollection, down there at Samson?

A. Inspected in 1940. The exact date I don't recall.
Q. Sometime in 1940?
A. Yes.
Q. Did you have a conversation with the Inspector?
A. That is correct.
Q. Do you remember who the Inspector was?
A. One of the Inspectors was a man by the name of Greene, if I remember correctly.
Q. A man by the name of Green?
A. Yes.
Q. Was there two of them?
A. There were two of them.
Q. Do you remember the other man's name?
A. I don't.
Q. Now, you had a conversation with both of these Inspectors after they had finished down there at your Plant?
A. That is correct.
Q. What was the substance of the conversation after they had inspected you? Did they make any complaint about any of your operations?
A. So far as I recall they never did; they did not make any complaint.
Q. Did the question of the stackers come up, and the fact that you were paying them at the piece rate?
A. It certainly did.
Q. And what was said about that?
A. If I remember correctly, they said we were keeping it beyond criticism, that they had had quite a bit of trouble with some mills on account of not keeping it the way it should be interpreted.
Q. But he said yours was all right?
A. All right.
Q. Did you tell the Inspectors that you were paying the piece-rate basis?
A. They understood that; yes.
Q. And did he make any complaint about it?
A. He did not make any complaint about it to me.
Q. Now, I want to ask you if from October 1938, when the Wage & Hour Law went into effect, down to the time that this bill was filed, with the exception of a few months, if you have always paid your stackers on a per thousand basis?
A. That is correct.
Q. Now, was there a period back there somewhere in those years when you paid by the hour?
A. That is correct.

Q. Was that for a few months?
A. Only a few months.
Q. All right, did you get off of the hourly basis?
A. Mr. Logan, experienced difficulties in getting——
Mr. McGuire. We object to that.
Q. Who is Mr. Logan? Is that your superintendent?
Mr. McGuire. We object to the question.
A. On account of the objection of the stackers, they wanted to stack by the thousand.

By Mr. Ball:

Q. I wish you would tell the Court about the objections the stackers made to working by the hour. What objections did the stackers make, and what did you have to do as a consequence?
Mr. McGuire. We object to whether or not the stackers objected.
Mr. Ball. We want to show that the stackers were put on an hourly basis and worked on an hourly basis, and then we had to put them back on the piece-rate basis.
The Court. I don't think it makes a bit of difference. If it is lawful for them to work on a piece basis, it is lawful that they agreed to work that way, and that ends the argument. If it is not lawful for them to work that way, it cannot be an agreement to circumvent the law.
Mr. Ball. Your Honor, we have a little bit more than that in an injunction case. In other words, as I understand the law, where you are trying to get an injunction against the party, it is not to punish them for past deeds, but to make an effort to prevent future violation, and the intention of the parties got a good deal to do with it. Under the cases that I have called to Your Honor's attention, I am trying to show by this witness that there was never any intention to violate the law; that the reason these men were put back on a piece rate basis was not because of any Wage & Hour Law, but because of the men themselves wanting it, and I have a right to show that, Your Honor.
The Court. I will let him answer the question.
Overrule the objection.
A. Will you state the question again please?

By Mr. Ball:

Q. Why did you put the men back on a piece rate basis?
A. They wanted to work on a piece rate basis.
Q. Were they willing to work on an hourly basis or not?
A. They complained about it.
Q. Now, you have told us about the first inspection and no complaint about the piece rate basis. Did you have another inspection?

A. Yes, sir; we had another inspection.
Q. Do you remember about when that was?
A. 1941, I think sometime in 1941.
Q. Did they make any complaint about anything then?
A. No complaint about the piece work basis.
Q. Was there a discussion about the piece work basis?
A. They said it was okeh.
Q. Did the Inspector tell you the way you were paying your men was all right?
A. It was okeh.
Q. Did either of those Inspectors tell you it was against the law to pay them on the piece rate basis?
A. They didn't.
Q. Now, that is the second inspection. Did you have a third inspection?
A. We had a third inspection in 1942.
Q. Was that just a few months before this suit was filed?
A. Mr. Ogle made that inspection.
Q. Did Mr. Ogle then complain about the piece rate basis?
A. He claimed we were not paying on the basis set out by the Wage & Hour Law.
Q. Now, that was four years after the Wage & Hour Law went into effect?
A. That is correct.
Q. Now, was that the first time that anybody of the Wage & Hour Division told you that you could not pay on the piece rate, or the per thousand basis?
A. That was our first notice to that effect.
Q. Now, I believe that after that you came to me and asked me what the law about piece rates was?
Mr. McGuire. Your Honor, we object to him going into all that.
Mr. Ball. Your Honor, I am trying to show here, that they have not had any intention of violating the law——
The Court. Objection overruled.

By Mr. Ball:

Q. Did you consult your lawyer right after the Inspectors came and told you the piece rate basis was a violation of the Act?
A. Yes, sir.
Q. Did you consult him—did you consult me?
A. I consulted with you.
Q. And did you ask me to make a study to see what the law was?
A. That is correct.

Q. And sometime after that we were served with the injunction papers in this suit?

A. That is correct.

Q. After the injunction suit was served, had you been able to get from me any definite advice about what the law or piece rate work was? Had I been able to advise you what the law was, or were you still ignorant about the law?

Mr. McGuire. We object to going into that.

A. We were still in doubt on it.

Q. So, when this bill was filed, you were still running your mill, weren't you?

A. That is correct.

Q. And your men had to be still paid every two weeks. That is correct, isn't it?

A. That is correct.

Q. Did you continue to pay your men actually under the piece rate basis?

A. Well, we had Mr. Logan, Mr. Logan is our manager—our orders are given to Mr. Logan——

Mr. McGuire. We object to that as not responsive.

A. I am attempting to tell you——

By Mr. Ball:

Q. How did you handle it after that?

The Court. Answer that question.

A. We handle it as it has been outlined in the Court, we kept the hours and continued to pay the men on the piece rate basis. The hours have been kept but the time has not been transferred to the permanent time records. It is in suspense.

Q. I will ask you if you have a separate sheet for that time. Did you run that figure before and since this suit was filed, showing the name of the man, the number of the hours that he worked, and the amount that he was to be paid?

A. That is correct.

Q. Did you also have a record for each man, for each week, and the amount of lumber that he stacked?

A. The records will sustain that.

Q. That shows in your records?

A. Yes.

Q. Now, I will ask you if the only difference between your record, the only difference between the records before this suit was filed and after this suit was filed, is that you have not transferred these figures into your permanent time book. Is that your understanding?

A. That is correct.

Q. Have you got any duplicate or any full set of books, to withhold anything in this case, since this bill was filed?

A. Not whatsoever.

Q. Have you made your books available for these gentlemen every time they requested to look at them?

A. We have attempted to aid them in any search for any information that they desired to get.

Q. Now, Mr. Youngerman, on yesterday your attorney advised you, that in his opinion, a certain kind of contract would meet the requirements of the Below case. Do you recall that?

A. I do.

Q. And I prepared for you an employment contract and recommended that you enter into this agreement with your stackers.

Now, how many stackers have you got working for you now?

A. At the present time there are only three of them stacking lumber.

Q. That is John Taylor, Clifton Holmes, and Clayton Carter?

A. That is correct.

Q. I show you three written employment contracts signed by you as president of Youngerman-Reynolds, and signed by mark by each of the three employees mentioned, and ask you if this is the employment contract that you entered into yesterday with those three men?

Mr. STEED. Your Honor, we object to any testimony with reference to these employment contracts, since Your Honor has previously held it is immaterial.

The COURT. The objection is overruled.

By Mr. BALL:

Q. Are these the contracts entered into?

A. Those are the contracts.

Mr. BALL. We offer the contracts.

Mr. MCGUIRE. We object on the ground that they are irrelevant and immaterial.

The COURT. This all goes to the question of whether the defendant acted in good faith to comply with the law. The objection is overruled.

(Marked "Defendants' Exhibit 4, 5 and 6" in evidence.)

The COURT. Mr. Youngerman, I understand there was a period of time after the effective date of the Wage & Hour Act that your lumber stackers worked by the hour?

A. That is right.

Q. And a record was kept of that work, and when they worked more than the hours prescribed, did you pay them overtime?

A. It was so ordered.

Q. When they were working by the hour?

A. Yes.

Q. And then, when you later on changed to the piece-time basis, do you know whether or not some of these men made as much or more wages under the piece-work basis, as they did when they worked under the hour basis, or did they make less?

A. Judge Kennamer, if I might add this——

Q. Do you know?

A. Stacking is common labor, and a man at work,—it has been the custom for a long time to stack by the thousand feet, and in a lot of instances where the weather is bad, the men would not go out—like yesterday it rained, they would not come out in the rain, and they quit; but when they come out and work long hours, on account of that, they work beyond the regular quitting time, then in hot weather, extremely hot weather, these men, in a lot of cases will quit when the weather is hot, and it has been the custom to do that. They go home then, and come back when it gets cool. Custom has grown up in the lumber industry, ever since I can remember, to pay stackers by the thousand. The nature of the work is such, like I have just said, they make more in that way by working than they can by working on the hourly basis. They have always made more. In those instances they made more, as I think the records will bear out. They made, in some instances, almost twice the wages they would make by working by the hour. We have no objection to paying the stackers by the hour. We have never had any objections to paying them by the hour, but when they get a lot of lumber down there, and it piles up and it must be stacked within a short time, especially in bad weather, and it is to our advantage to get the lumber up and that is when these men work, when this is to the men's advantage to work longer hours. They get paid overtime the price that they are paid for stacking. We have always intended that, to include in the amount that time and a half for overtime the minimum wage. We have always worked that way.

Q. Do they work on your time or their time?

A. We have no objection to that. I don't know, in rare instances, these men even turn in the wrong time.

Q. The time they come to work?

A. Yes. We had one Wage and Hour man who didn't know what he was doing, even run some stackers off one morning about 7 o'clock.

Q. Did what?

A. That one wage and hour man, Inspector, who was not properly——

Q. What time?

A. He happened to come there to the mill early, and the stackers were at work, so one time he ran them off.

Q. You mean he ran the men out of their work?

A. Yes, sir.

Q. To turn lumber out of the mill is it put on a dolly or a wagon, dump dolly in some way?

A. The lumber comes to the mill in straight-line production, and it goes through and is put on the green chain, and on the green chain we have men there to pull the lumber off.

Q. Are these stackers or hourly paid men?

A. They are hourly paid men.

Q. Then, where does it go?

A. The lumber is handled off the green chain and then it is put on various wagons in different cars, and it is hauled to the yard and laid off in front of the stack.

Q. And is it laid off by hourly paid men?

A. Yes.

Q. And it is then laid in a pile?

A. Yes.

Q. Is that the point where the stackers pick it up?

A. It is.

Q. Now, do the stackers work these piles when they get ready to start, they start when they get ready and quit when they get ready to quit?

A. They have always done that.

Q. Do some of them work before the mill opens and do some of them work after the mill closes?

A. They practically run the stacking, and they work whatever time they get to work.

Q. Are there times when the mill is running and it is raining, or cold, when the stackers are not working?

A. That is right.

Q. And there is lumber there to be stacked?

A. That is right.

Q. So, would you say these stackers are, more or less, independent contractors working on their own time?

Mr. STEED. We object to that question. That is calling for a conclusion of law as to what any independent contractor is,

as distinguished from other employees, and certainly this witness cannot answer that.

The COURT. Of course, it is for the Court to say whether this course of conduct makes them independent contractors. The witness may describe the manner in which they worked and it is for the Court to say whether they are independent contractors.

Mr. STEED. I submit, Your Honor, if that is the case, then it will probably require our going into additional proof to determine the obligations of the so-called independent contractor.

The COURT. There has been no proof offered on that. The witness testified as to the agreement and how they worked, and what they accomplished, and it will be for the court, from that evidence, to find whether they are independent contractors or not.

Mr. STEED. I submit the question, of whether or not they are independent contractors——

The COURT. I will sustain the objection. It is the conclusion of law which the Court has to pass on.

Mr. STEED. But I just want to make my position clear, Your Honor, the question of whether they are independent contractors or not turns around the broad question of whether the company has control over them. I did not intend to go into that question this morning, and this is the first time we had that proposition brought out, and if they are going to assert it as a defense, I think we should have the opportunity to meet it with additional proof.

The COURT. I will sustain the objection to the question he asked and I will rule on the testimony as a whole, when I come to a conclusion of whether the status is that of independent contractor or not.

By Mr. BALL:

Q. Now, Mr. Youngerman, with that lumber laying out there, ready for the stackers to stack, I believe you said that they then worked on their own time, and I will ask you this: Did your company require any of the stackers to work any particular time, or as long as he chose to work on his own time?

A. No, sir.

Q. Did you work or cause any of these men to work on an overtime basis, or was it simply left to their own discretion as to how long they would work, as long as there was lumber there to be stacked?

A. It was left to their own discretion.

Mr. BALL. Take the witness.

Cross-examination by Mr. McGUIRE:

Q. Mr. Youngerman, these stackers were working for you and your company all the time they were stacking lumber, weren't they?

A. That is correct.

Q. And you all instructed them or directed them, when they were stacking lumber, to keep a record of the work they did, didn't you?

A. Sure.

Q. You directed them to turn in a copy of the record of the hours worked, didn't you?

A. In some instances.

Q. Well, I mean as a general course, you left it up to the stackers to keep the number of hours worked per day or per week?

A. Mr. Logan could probably answer that question better than I could.

Q. Mr. Who?

A. Mr. Logan.

Q. He was the boss down there on the yard?

A. Mr. Logan, he was the superintendent.

Q. And you very seldom went down there?

A. I was down there from one to two days a week; lots of times two days a week.

Q. But he was in charge, in actual charge down there, wasn't he?

A. That is correct.

Q. And he hired and fired the stackers?

A. That is correct.

Q. You stated when Mr. Ogle talked to you last Fall that that was the first notice you had about these lumber stackers being paid improperly, didn't you?

A. The Wage and Hour men did not question us before.

Q. And you did not take exception, after Mr. Ogle talked to you and told you how the Administrator—what his interpretation was with reference to the payment of these workers; you took no exceptions to that?

A. I took it up with our attorney.

Q. And you have not changed your system of operating with reference to these workers even to this very day, have you?

A. He has not advised us to.

Q. I did not ask you that. As an official of this company, you have testified to the fact that you have not changed your method of paying the stackers until today?

A. We still pay by the thousand.

Q. And that is the way you were paying when Mr. Ogle was there?

A. That is true.

Q. You knew then, you knew before that what the Administrator of the Wage & Hour Division had interpretated the law to be with reference to the payment of these workers, didn't you?

A. I don't know 'till yet.

Q. Well, you read the Interpretative Bulletin that was sent to you on December 11th, 1941, didn't you?

A. Yes; I read it.

Q. And it pointed out very clearly the same position we are pointing out here today, didn't it?

A. We think we have complied with the law.

Q. Now, you said you have read it?

A. Yes.

Q. And you said you understood it?

A. No; I did not understand it.

Q. But you did get that Interpretative Bulletin in answer to your letter, didn't you?

A. That is right.

Q. And you all discussed and talked about the proper method of paying these workers back in December, and prior thereto, in December 1941, didn't you?

A. Yes.

Q. Now, you say you are holding some of these records there in suspense. What do you mean by "suspense"?

A. We have paid the men by the thousand, just as we have always done, but, we are keeping the hours. We count them up, the number of hours; and we keep the hours.

Q. It does not cost you any more to work these stackers, to ask them to work for 60 hours or 70 hours a week, than it would cost you to work them 30 hours?

Mr. BALL. We object to that. He said the men work on their own time.

The COURT. I will let him answer that.

By Mr. McGUIRE:

Q. It does not cost you any more per hour to work them 60 or 70 hours a week, than it cost you to work them 30 hours?

A. It would not cost us as much to pay them by the hour as to pay them by the thousand.

Q. Now, there is no extra burden, as far as cost is concerned, placed on you by working them 50 hours than it would cost to work them 40 hours, is there?

A. It depends on which way you figure it.

Q. How could you figure it? In what way?

A. Well, if you figure on an hourly basis, you will arrive at one figure.

Q. I mean the way you are paying them. You are not paying them by the hour, are you?

A. No, sir.

Q. All right, let us take it the way you are doing it, the way you are paying them, it would not cost you one extra cent, then, per thousand, because you are paying them that way, if they worked 60 or 70 hours a week, it would not cost you any extra compensation, it would not put any increased burden on you, if you pay them [that] way, would it?

A. It depends on the way you figure.

Q. I am asking you to figure it the way you are paying them.

A. Well, the way we pay is per thousand basis, and you can arrive at your own conclusion.

The COURT. That is an argumentative question, because it is an obvious fact that it does not cost him more.

Mr. MCGUIRE. I am glad that it is obvious to Your Honor.

By Mr. MCGUIRE:

Q. Who hires those stackers?

A. Mr. Logan.

Q. Who tells them what to do and where they are supposed to work?

A. Mr. C. L. Daniels, and Mr. Howe has charge of that part of it.

Q. And who fires them?

A. Mr. Logan, usually.

Q. And do you pay Social Security on them?

A. Certainly.

Q. In other words, while they are on your premises working for you, you have control over them, haven't you, Mr Youngerman?

A. Sometimes I don't think so.

Q. All right, if you want a man to stop stacking and to work on something else, he usually does what you ask him to, doesn't he?

A. Well, some of them do not. You heard John Taylor say he had never done any other work.

Q. Well, you have some of them that way?

A. Some of them, and some of them don't mind you.
Q. John grew up with you there, didn't he?
A. He grew up stacking lumber.
Q. You hired him some 25 years ago, didn't you?
A. Well, I hardly think he has been with me 20 years.
Mr. McGUIRE. That is all.

Redirect examination by Mr. BALL:

Q. How long have you been in business, Mr. Youngerman, in the lumber business?
A. Since 1922.
Q. About 21 years?
A. Yes, sir.
Q. Is this the first time the Government or anybody has ever jumped on you and accused you of a violation of the law?
A. The first time.
Mr. McGUIRE. We object to that, Your Honor, it is immaterial.
The COURT. I don't see the materiality of that.
Mr. BALL. You may come down.
(Witness excused.)
JOHN LOGAN, a witness for and in behalf of the defendant being duly sworn, testified as follows:

Direct examination by Mr. BALL:

Q. Mr. Logan, are you the mill superintendent for Youngerman-Reynolds down at Samson?
A. Yes, sir.
Q. How long have you been with them?
A. I have been down there going on 6 years.
Q. How long have you been working for Youngerman-Reynolds?
A. About 18 years.
Q. Now, since October 1938, what sort of basis have you been working on with the stackers?
A. We have been working them on the thousand basis.
Q. How does that compare with the way the other mills in that section worked their stackers?
A. Right in that section there is no other mills that I know of, that I know anything about, how they handle it.
Q. You don't know how they handle it?
A. No, sir.
Q. Now, is the method of paying these men since the Wage & Hour Law went into effect any different than what it was before?
A. No difference, only we keep up with the hours they make.

Q. You did not keep up the hours before the law?
A. No, sir.
Q. But now you have been keeping up the hours?
A. Yes, sir.
Q. With the exception of a short period of about eight months?
A. Yes.
Q. Mr. Logan, were you down at Samson when Mr. Greene came in there in the early part of 1940?
A. Yes.
Q. And did he make an inspection of your mill and talk to your employees, and look at your records?
A. Yes; he and Mr. Walden.
Q. Two Wage and Hour men?
A. Yes.
Q. Did you tell them how you were paying the stackers, that you were paying the stackers by the piece?
A. Yes.
Q. Then did they okeh that or criticize it?
A. They said it was all right. At that time we did not know anything about the method of how things ought to be done, and I asked them a few questions and they told me everything was satisfactory. He said a lot of times they have had trouble with people, the way they were handling the stackers, but he said that with ours everybody was satisfied, and they thought it was all right.
Q. Was anybody else present at that time, do you remember, when you had the conversation with those two men?
A. I don't recall.
Q. Now, did you have a second inspection later?
A. Yes; next year.
Q. Do you remember approximately when that was?
A. In 1941.
Q. Well, who came down then?
A. Mr. McFerrin.
Q. And did he look over your books and records?
A. Yes.
Q. Well, did he make any criticism about the way you were paying your stackers by the piece?
A. Not any at all.
Q. Was there any conversation about it?
A. Yes. We talked about the stackers and he said the stacking is all right.
Q. Said it was all right?
A. There were other suggestions he made, but no comment on the stacking at all.

Q. The stackers were all right?
A. Yes.
Q. Did you have a third inspection before this suit was filed, a few months before this suit was filed?
A. Yes.
Q. Mr. Ogle came down there at that time, didn't he?
A. Yes.
Q. And what did he say?
A. Well, everything was all right but the stackers.
Q. What was it about the stackers?
A. He said the stacking should be handled on an hourly basis, and he told to figure it by dividing the hours, or something, into the amount of money, and getting the rate, or something. That was the first time I knew about it.
Q. Was that the first you ever knew, since the Wage and Hour Laws had been in effect, that you could not pay your stackers on piece rate compensation?
A. Yes.
Q. And that was the third inspection that you had?
A. Yes.
Q. Well, did you notify Mr. Youngerman about what Mr. Ogle said?
A. He went on up to the office and talked to him.
Q. Who did?
A. Mr. Ogle.
Q. And Mr. Ogle talked to Mr. Youngerman, did he?
A. Yes.
Q. Now, Mr. Logan, you heard Mr. Youngerman's testimony about the way the stackers worked, on their own time?
A. Yes, sir.
Q. Is that the way it is done?
A. Yes.
Q. And is it your testimony that these men work on their own time, *right* than on your time?
A. Yes.
Q. Would these men work more than forty hours a week? Is it correct to say that those men worked more than forty hours?
A. No; they would not, they would keep up with the lumber, any time they keep up with the lumber they would not work forty hours, and, the few instances they may work overtime to keep up with the lumber. Most of the times it was forty hours a week to keep up their piles, or to put up the stacks, as you call it?
A. Yes.

Q. And the overtime, you say, is the exception rather than the rule?

A. Yes.

Q. Now, did you pay them on the hourly basis for a period of time?

A. Yes.

Q. Why did you quit?

A. I will tell you, they said they were going to quit.

Q. You mean the stackers were going to quit?

A. Yes.

Q. Why?

A. They wanted to be paid by the stack.

Q. Why is that?

A. Well, sometimes, when they come out to stack in the morning, they do it before it gets hot, and then, when it gets hot they knock off and come back in the afternoon.

Q. Does the mill knock off when it gets hot?

A. No, sir.

Q. That applied when it was cold, did they knock off when it was cold?

A. Well, it is not necessary to tell them then.

Q. What about your mill when it is raining. Do you shut down the mill when it is raining?

A. No, sir.

Q. Now, Mr. Logan. some question has come up here that a man would work as a stacker for a certain time during the week, and may be he would get caught up on his stacking work and we would give him some work over in the mill, and suppose he would work forty hours stacking, then you gave him, say, eight hours work over in the mill, would you pay him straight time or time and a half for those hours he worked in the mill?

A. Pay him time and a half when they work, when there is a place where the lumber stackers are working.

Q. So that you do pay him overtime in the mill, you pay him time and a half overtime, is that right?

A. That is right.

Q. Were you down there when the Wage & Hour Inspector ran those stackers off, when they were working before the mill opened?

A. Yes.

Q. Did they tell them they couldn't go to work?

A. Yes; they told them they couldn't go to work until the mill started to work.

Q. And they later changed all that?

A. What is that?

Q. And they later changed all that?

A. Yes, sir; they changed all that.

Q. Even when that happened did they make any complaint about paying them by the thousand?

A. No, sir.

Q. No complaint at all?

A. No complaint.

Mr. BALL. You may take the witness.

The COURT. Mr. Logan, there is some testimony here that on April 1941 to December 1941 there was no records kept of the hours on these stackers, the hours the stackers worked. Do you know how that came about?

The WITNESS. Well, Judge, the only thing is, the first inspection we had they were stacking that way when we had it, and they brought up that we should not pay them that way, and we just did not know.

Cross-examination by Mr. McGUIRE:

Q. Why are you keeping records back of February 1941 for the stackers, when you stopped in 1941 for a period of time?

A. Well, we commenced keeping records when the Wage & Hour started and just kept it up until that time.

Q. There is a period of time from April 1941 to January 1942 that you did not keep records of stackers at all, did you?

A. Well, we kept the record. I am quite sure we kept the record at the mill of the stackers.

Q. Now, you made a statement that when a stacker worked forty hours stacking and eight hours over at the mill that he got time and a half for the eight hours?

A. Yes; that is correct.

Q. On what basis did you pay him?

A. On whatever we paid the men at the mill at that time, if it would be 30¢ or 35¢; I don't remember now.

Q. Can you go back to your records and show where your stackers worked overtime?

A. Our stackers worked very little in other places than stacking; very seldom did they work anywhere else. Some of them didn't work anywhere else.

Q. Can you show us where one has been paid overtime the money for stacking for the whole period from 1938 up to date, where any stacker has worked overtime?

Mr. BALL. Your Honor, we would like to have the witness be given an opportunity to go to the records.

The COURT. I am not going to sit here until he does.

By Mr. McGUIRE:

Q. You said these men worked up there on their own time as stackers?

A. When they would go to work; yes.

Q. What you mean to say is that they kept their own time when they would go to work and when they would stop?

A. Yes; that is right, they would let us know when they would start to work and when they would quit.

Q. You don't mean to imply that they kept a record wherein the number of hours worked were turned in to the permanent record?

A. No; they have a foreman out there who checks on it with them.

Q. You have a foreman out there to check on whether the men are working?

A. Yes.

The COURT. And all these stackers are under the supervision of these foremen?

The WITNESS. Yes.

By Mr. McGUIRE:

Q. You said Mr. McFerrin said in 1941 your stackers were okeh?

A. Yes.

Q. You were not working your stackers over forty hours then, were you? Is that correct?

A. We told the foremen to make it forty hours.

Q. And in that connection Mr. McFerrin told you that if you paid them the piece rate, and if they work any overtime—I want to ask you if Mr. McFerrin did not tell you it would have to be broken down to the hourly rate to get the overtime rate?

A. No, sir; not in connection with that at all.

Q. You recall the discussion with us about this hourly rate of pay when we were down there some weeks ago?

A. Yes, sir; Mr. Ogle talked to me about it when he came down and made an inspection.

Q. And you told him then that that just did not mean anything, didn't you?

A. No, sir; not that it did not mean anything.

Q. I will ask you if you did not say to Mr. McFerrin, in my presence, and Mr. Steed's presence, when you were asked the purpose of showing the hourly rates last May, when you were asked what the purpose was, you said, "We still pay on the piece rate basis, and that does not mean anything"?

A. The hours were just to find out the record, to see how many hours they worked in the week, and just to have a record. We pay them on piece work.

Mr. McGUIRE. I think that is all.

Redirect examination by Mr. BALL:

Q. Mr. Logan, I will ask you if the stackers keep a record of the amount of lumber that they stack.? They keep their own record on that, don't they?

A. Well, I think they kind of check it, but they do so much.

Q. But they keep their own record. Do you keep your record?

A. We check the lumber every two weeks, and that is practically every time we pay them.

The COURT. One of the other employees in the mill check up to see how much they do?

The WITNESS. Yes, sir.

(Witness excused.)

JESSE L. WILLETTE, a witness for and in behalf of the defendant being duly sworn, testified as follows:

Direct examination by Mr. BALL:

Q. Mr. Willette, what business are you in?

A. Mercantile business.

Q. Whereabouts?

A. Samson, Alabama.

Q. Where is your place of business with reference to the Youngerman-Reynolds mill?

A. Across the street.

Q. How long have you been down there; several years?

A. Yes; four or five or six.

Q. You are across the road from the mill?

A. Yes.

Q. Do you know which of the men are stackers at the mill?

A. Yes.

Q. Do those men trade with you at your store there?

A. Some of them do; yes.

Q. Now, I will ask you if you have occasion to see those stackers leave their work from time to time during the time the mill is running, leaving their job, and come over there to your store?

A. Time and time again; yes.

Q. Time and time again they come to your store during work hours; come over there to do business with you?

A. Yes, sir.

Q. Have you ever had occasion to see any of those stackers leave the mill completely, while the mill was running?

A. Yes.

Q. That is, leave completely when the mill was still running?

A. Yes.

Q. And come back when they got ready?

A. Well, I couldn't say just when they came back.

Q. Well, have you seen them come back?

A. Yes.

Q. Have you seen the men down there working before the mill was open in the morning?

A. I don't get there that early.

Q. Have you seen any of them work after the mill closed in the evening?

A. I wouldn't say I have, because when I am busy with people, when they get off from work.

Q. You have seen them leave their work and come over to your store during working hours?

A. Yes, sir.

Q. Have you seen any of the other boys do that?

A. No, sir.

Mr. BALL. That is all.

Cross-examination by Mr. McGUIRE:

Q. Mr. Willette, did they have a timekeeper about the yard down there?

A. I don't know just who keeps the time.

Q. You know Mr. Daniels, don't you?

A. Yes.

Q. Don't you know that he keeps the time in a big book; the time of these stackers?

A. That I don't know, I wouldn't know that; no sir.

Q. You don't know how many hours these stackers work, do you?

A. No, sir.

Q. And if they come over there and spend five, ten, or fifteen minutes, or a half hour, whether they figured it off of their hours, or whether they figure in that time?

A. No, sir.

Q. You don't know how many hours a day they worked, do you?

A. I would not say with accuracy.

Q. Do they work about the same number of hours as the mill hands work?

A. Yes; I would say in that neighborhood.

Q. Of course, you don't know what the records will show, if they show that they worked ten hours a day, or ten hours a week, do you?

A. No, sir.

Q. You don't know that their records are incorrectly shown, do you?

A. I beg pardon.

Q. If the records show 40, 45, or 50 hours a week, you don't claim that Youngerman-Reynolds are keeping false records, do you?

A. No, sir.

Mr. McGUIRE. That is all.

Redirect examination by Mr. BALL:

Q. You did say you saw the stackers come over there while the mill was running?

A. Yes.

Q. Did you see any of the mill hands leave their job and come over while the mill was running?

A. I have seen a few in sickness, or something like that.

Q. And in other cases they stayed on the job?

A. Yes.

Mr. BALL. That is all.

(Witness excused.)

C. L. DANIELS, a witness for and in behalf of the defendant being duly sworn testified as follows:

Direct examination by Mr. BALL:

Q. Mr. Daniels, who do you work for?

A. Youngerman-Reynolds.

Q. How long have you worked for them?

A. I have been working for them, let's see, since December 1937.

Q. You have been working for them a good many years?

A. Yes, sir.

Q. What sort of work do you do for them; bookkeeping or something?

A. Yes.

Q. Do you keep any time books for them down there?

A. Yes.

Q. Are these the little books that look like these little sort of—these dirty looking books?

A. Yes.

Q. What do you keep in those books? What is in those books? What are they called?

A. Well, I keep the time that the men work.

Q. Now, about these stackers, have you got any stackers in these little books?

A. Yes.

Q. What do you show about the stackers in those books?

A. Show how many hours they make each day.

Q. Who keeps a record of the amount of lumber those men stack?

A. How do you mean? Will you explain that?

Q. Well, who would go around and count up to see how many thousand feet they stacked?

A. Mr. Logan.

Q. Mr. Logan keeps that?

A. Yes.

Q. Do you keep the time of all the men?

A. Yes.

Q. I would like to ask you just about those stackers; do they work the same hours that the mills work, or do they work whenever they please?

A. Well, sometimes they will come down early in the morning.

Q. You mean before the mill opens?

A. Yes; they have done that.

Q. Are you there then?

A. No, sir.

Q. Is there anybody there to take their time?

A. No; you see, they work there and check their own every day.

Q. Does anybody have to tell them what to do?

A. Well, they know what to do.

Q. How about after the mill closes, do you see any of them then?

A. Well, there has been a time or two in the summer time when they knocked off early, when it gets hot; something like 10 or 11 o'clock.

Q. And does the mill do that, too?

A. No, sir; the mill runs right on, unless it breaks down, or something like that.

Q. Mr. Daniels, would you say that these men stack lumber when there is lumber to be stacked, and that they stack on their own time or on the company's time?

A. Well, they stack on Youngerman-Reynolds' time, as far as that is concerned.

Q. Does Youngerman-Reynolds decide that or do they decide that for themselves?

A. Well, they decide it for themselves.

Q. Have you seen, sometimes, these men just leave the job and go off somewhere?

A. Yes.

Q. Go over to the store?

A. Yes.

Q. And do you see them there, maybe get into automobiles and ride off?

A. Yes, sir.

Mr. BALL. That is all.

Cross-examination by Mr. MCGUIRE:

Q. You still tell them what should be done, you and the officials down there?

A. Yes, sir.

Q. They are subject to your orders?

A. Sir?

Q. They take orders to stack here and there?

A. Well, they do to some extent. Of course, they are contracting and they are not like the men who work direct.

Q. You don't see this time paid that you have down in your little book; is that correct?

A. I would say it is correct.

Q. I say you take the time they give you as correct?

A. I wouldn't say I take the time they give me, I see the time when it is put down, of course; I check it and watch it as near as I can.

Q. But you do put down what they tell you?

A. Yes.

Mr. MCGUIRE. That is all.

Redirect examination by Mr. BALL:

Q. Do these men who stack lumber keep a record of how much they stack themselves?

A. Well, after awhile they put a mark there.

Q. I say do these Negroes count the layers that they stacked so that they can figure out how much has been earned?

A. Yes.

Q. And you figure where they put the marks there, five or ten layers, to see how much is earned?

A. That is right.

Q. Mr. McGuire asked you about telling these stackers what to do. Do you tell them "there is the lumber" and there is where you want to have it stacked, or does the foreman tell them that?

A. No, sir; not the foreman, he spends time going around shipping the lumber and——

Q. Well, do you permit them to make their own hours?
A. Yes.
Mr. BALL. That is all.
(Witness excused.)
Mr. BALL. We rest.
The COURT. Any further testimony?
Mr. STEED. I think not. We have nothing further, Your Honor.
The COURT. Well, all of the witness are discharged on both sides.
The COURT. Gentlemen, I want to make this statement before you begin arguing. As I stated in the pretrial hearing, my mind is thoroughly made up that where a fixed wage is agreed upon it makes no difference how high it is, whether by the day, or by the hour, other than that of overtime, when there must be time and a half paid.
I am interested in this proposition: Where there is no fixed wage agreed upon and the contractors do work by the piece, what rule of law should be applied on that phase of this case. I will hear from you, gentlemen.
(Whereupon counsel for the respective parties argues their contentions to the Court.)

*Findings of fact, opinion, conclusion of law, and final judgment*

This matter coming on to be heard on the complaint of the plaintiff for an injunction to enjoin the defendant from violating the provisions of Section 15 (a) (1), 15 (a) (2), and 15 (a) (5), of the Fair Labor Standards Act hereinafter called the act, and the court having heard in open court the testimony of the witness and having seen the exhibits offered in evidence and having heard the arguments of counsel, now makes the following.

FINDINGS OF FACT

1. The defendant is a corporation under the laws of Tennessee with its principal office in Montgomery, Alabama, and with a lumber manufacturing plant at Samson, Alabama, within the jurisdiction of this court.
2. The defendant has at all times since the effective date of the act been manufacturing lumber for shipment in interstate commerce and subject to the act.
3. The complaint as filed charged that the defendant has violated the provisions of the act in that it had shipped lumber produced by certain suppliers in violation of the act but the plaintiff in open court abandoned this claim.

4. It is also charged that the defendant failed to keep records showing the hours worked each workday and each workweek, the total straight-time earnings for each workweek, and the total weekly overtime compensation with respect to many of its employees. On the trial this contention was confined by the plaintiff to employees engaged in stacking lumber. It was not charged that the defendant failed to keep adequate records with reference to its mill employees.

5. There were offered in evidence office time sheets showing that records were kept by the defendant showing the hours worked each workday and each workweek by its stackers in 1940, 1941, 1942 and up until the time of the trial of the current year, with the exception of a period of approximately eight months in 1941. But there was evidence that although the office sheets did not show the time for the eight months period there were time books kept at the mill showing the hours worked during most of this period. There is not sufficient evidence that the defendant intentionally failed to keep adequate records.

6. The remaining charge was that the defendant employed certain lumber stackers on a piece-work basis and during certain weeks these stackers worked more than the maximum hours allowed by the act without the payment of overtime compensation. Prior to the effective date of the act and at most of the time since the effective date of the act and without any change from its previous methods of operation, the defendant employed stackers on the basis of an agreed price per thousand board feet of lumber stacked. During most of the year 1940, the stackers were taken off of the per thousand basis and were put on an hourly basis and were paid time and a half for all overtime worked. The stackers became dissatisfied with this arrangement, threatened to quit and the defendant changed back to the per-thousand basis.

7. During 1941 from January to May the stackers were not worked any overtime and from May to the end of the year there was very little, if any, overtime worked. During 1942 out of approximately 234 man weeks of work approximately 87 man weeks were overtime. In all instances where overtime was worked the amount paid exceeded the statutory minimum of time and overtime indicating that the piece-rate basis was not used to avoid paying the statutory minimum. During the fall of 1942 one of the plaintiff's inspectors notified the defendant that it was a violation of the law to work the stackers on a piece-rate basis without paying time and a half for overtime. This was the first notice the defendant had that its system of piece-rate pay was claimed by the plaintiff to be a violation of the law. The defendant soon afterwards ceased to work the

stackers any overtime and from January 1, 1943, until the time of the filing of the suit no overtime was worked.

8. The language of the statute applicable to overtime is not sufficiently explicit to make it clear to a layman that it is a violation of the law to work a stacker on a piece-rate basis without additional compensation for overtime. The defendant in this case did not intentionally violate the law with reference to its stackers and when the plaintiff called its attention for the first time in the fall of 1942 to the plaintiff's position in this connection the defendant soon after ceased to work the stackers overtime.

9. After the suit was filed there was some overtime worked and the defendant continued to pay the amount which would be due on the piece-rate basis but held its books in suspense so that the amount paid would be considered as an advance and if it should owe any additional amount for overtime it could be paid. Prior to the trial September 21, 1943, the defendant abandoned its piece-rate basis and entered into a contract with its stackers by which it agreed to pay them on an agreed hourly basis of thirty-five cents per hour, the legal rate, with time and a half for all overtime worked and with a guarantee that if the amount of lumber stacked, figured on an agreed piece basis exceeded the amount payable on the hourly basis that the stacker would then be paid an additional amount so that under this arrangement the stacker would in any event be paid for time and overtime with the possibility of receiving additional compensation depending upon the amount of lumber stacked.

10. In view of the fact that the defendant has entered into a new contract with its stackers providing for time and overtime with a guarantee of additional pay based on the amount of lumber stacked and has ceased to employ its stackers on the basis complained of and the defendant having no apparent intention of returning to the method of payment in dispute, there is no necessity for an injunction to prohibit future violations.

## OPINION

This court is aware of the fact that it is no proper function of a court to pass on the wisdom or lack of wisdom of any valid enactment of a law, and that it is the duty of the court when its processes are invoked to give effect to the law as it finds it to be. But at the same time where the injunctive power of the court is sought to be invoked there should be clear proof of an intentional purpose to circumvent or evade the law and un-

willingness to conform to the law. The administrative agency of the government in administering the wage, and hour law would make it more effective by showing employers how to observe the law and by helping them to interpret and understand the law where its provisions are not clear rather than by invoking the injunctive powers of the court in cases where there is no intention to disregard or evade the law.

The individuals operating the defendant corporation in this case are laymen and are not skilled in interpreting and construing new laws. They no doubt reached the conclusion that under their arrangement with the lumber stackers they were paid wages which amounted to as much as or more than the minimum wage prescribed in the act with time and a half paid for all overtime and that as this arrangement was satisfactory to both the employer and the employee that they were acting within the spirit and intention of the law that they were not required to pay any additional amount. In this conclusion, if the construction placed on the act by the administrator and some of the court is right, the defendant was wrong. But in the opinion of this court it was not such wrong and there was not such intentional violation of the law resulting therefrom as to call for injunctive relief especially where there is evidence, as there is in this case, that the defendant has ceased such practices and has manifested a desire and willingness to fully conform to the provisions of the law.

### CONCLUSIONS OF LAW

1. That the purpose of an injunction is not to punish a defendant for past acts but to deter a defendant from future unlawful acts.
2. The court finds no evidence of any wilful intention on the part of the defendant to violate the act.
3. The court finds no evidence of any intention of future violations of the act and no necessity for an injunction.

### JUDGMENT

In accordance with the foregoing findings of fact, and conclusions of law, it is ordered by the court that the plaintiff's prayer for relief is denied and that the action be dismissed and that the defendant go hence freed of any cost.

Done this 25th day of October 1943.

C. B. KENNAMER,
*United States Judge.*

Filed Oct. 25, 1943. O. D. Street, Jr., Clerk.

*Motion to amend findings of fact and conclusions of law*

Now comes the plaintiff, and for reasons hereinafter assigned, moves the Court to amend its Findings of Fact and Conclusions of Law, heretofore filed, in the following particulars:

I

In accordance with the evidence in the record and the admissions of counsel for defendant made at the trial, Finding of Fact No. 2 should be amended to read:

"The defendant and its employees, including employees engaged in the stacking of lumber, have, during every workweek since the effective date of the Fair Labor Standards Act of 1938, been manufacturing lumber for shipment in interstate commerce and subject to the Act."

II

In order fully to describe the substance of plaintiff's complaint, the following should be added to Finding of Fact No. 3:

"The complaint, as filed, also charged that the defendant had violated the provisions of the Act in that it had shipped in interstate commerce lumber produced by employees of the defendant in violation of the Act. The plaintiff did not abandon this allegation and seeks injunctive relief thereon."

III

By striking the last two sentences of Finding of Fact No. 5 which read as follows:

"But there was evidence that although the office sheets did not show the time for the eight months period there were time books kept at the mill showing the hours worked during most of this period. There is not sufficient evidence that the defendant intentionally failed to keep adequate records."

and making the following in lieu thereof:

"The records in evidence and testimony show that the defendant did not, during this eight-months period, make, keep, and preserve records setting forth the information, with respect to the employment of lumber stackers, required to be recorded by regulations of the Administrator; and, more particularly, during said period, the defendant failed to make, keep and preserve records of (1) the hours worked each workday and each workweek, and (2) the total weekly overtime compensation. The

records in evidence and testimony further show that during the remainder of the time involved in this action, the defendant did not make, keep, and preserve records setting forth the information, with respect to the employment of lumber stackers, required to be recorded by regulations of the Administrator; and, more particularly, the defendant failed to make, keep and preserve records showing the total weekly overtime compensation. However, there were some indications that defendant also possessed some time books kept at its mill which allegedly showed the hours worked during most of the eight-months period in 1941. Under the circumstances, the record before the Court affords an insufficient basis for finding that defendant intentionally failed to keep adequate records."

IV

By striking the last three sentences of Finding of Fact No. 6 which read as follows:

"Prior to the effective date of the act and at most of the time since the effective date of the act and without any change from its previous methods of operation, the defendant employed stackers on the basis of an agreed price per thousand board feet of lumber stacked. During most of the year 1940, the stackers were taken off of the per thousand basis and were put on an hourly basis and were paid time and a half for all overtime worked. The stackers became dissatisfied with this arrangement, threatened to quit and the defendant changed back to the per thousand basis."

and making the following in lieu thereof:

"Prior to the effective date of the Act and at all times thereafter and until the date of trial, the defendant employed stackers on the basis of an agreed price per thousand board feet of lumber stacked."

V

By striking the fifth sentence of Finding of Fact No. 7 which reads as follows:

"This was the first notice the defendant had that its system of piece-rate pay was claimed by the plaintiff to be a violation of the law."

and making the following in lieu thereof:

"Also, the plaintiff introduced in evidence correspondence which passed between the defendant and the Birmingham Office of the Wage and Hour Division in December 1941 in which

correspondence official representatives of the plaintiff advised the defendant of the proper method of computing overtime compensation for employees employed on a piece-rate basis."

VI

By striking the last sentence of Finding of Fact No. 8 which reads as follows:

"The defendant in this case did not intentionally violate the law with reference to its stackers and when the plaintiff called its attention for the first time in the fall of 1942 to the plaintiff's position in this connection the defendant soon after ceased to work the stackers overtime."

and making the following in lieu thereof:

"The defendant was apprised by the plaintiff of the proper method of computing overtime compensation on piece-rate employees on at least two occasions, in December 1941, and in the fall of 1942; and during many workweeks thereafter and continuing at the date of trial defendant worked its lumber stackers in excess of the statutory maxima, paying them therefor their piece-rate earnings without any other additional compensation."

VII

By striking the first sentence of Finding of Fact No. 9 which reads as follows:

"After the suit was filed there was some overtime worked and the defendant continued to pay the amount which would be due on the piece-rate basis but held its books in suspense so that the amount paid would be considered as an advance and if it should owe any additional amount for overtime it could be paid."

VIII

By amending the second sentence of Finding of Fact No. 9, so that it will read as follows:

"Just prior to the trial, and on September 21, 1943, and after its records for several months prior thereto indicated that the lumber stackers were consistently working hours in excess of the statutory maximum, defendant obtained from these employees signatures to employment agreements which provided the following method of compensation: A basic or regular rate of pay per hour for the first 40 hours each week was provided and not less than time and one-half such basic rate was specified for hours over 40 in each week, and a guarantee set up assuring the employee that he would receive weekly for regular

time and for such overtime as he might work a sum arrived at by figuring the amount of stacking done by him in the week on the basis of 80 cents per thousand board feet for flat stacking and 70 cents per thousand board feet for ricked lumber."

IX

By making the following additional Conclusions of Law:

(a) The defendant and its employees, including employees engaged in the stacking of lumber, have since October 24, 1938, the effective date of the Fair Labor Standards Act of 1938, been engaged in the production of goods for commerce, within the meaning of said Fair Labor Standards Act of 1938 (*United States* v. *F. W. Darby Lumber Co.*, 312 U. S. 100).

(b) Section 7 of the Fair Labor Standards Act of 1938 requires that overtime shall be compensated for at a rate not less than one and one-half times the "regular rate" at which the employee is employed. *Overnight Motor Transportation Co.* v. *Missel*, 316 U. S. 572; *Warren-Bradshaw Drilling Co.* v. *Hall*, 63 Sup. Ct. 125).

(c) The "regular rate" of an employee employed on a piece-rate basis is determined by dividing the total earnings of such employee during the workweek by total hours worked by such employee during the workweek (*Holland* v. *United States Bedding Company*, 5 Wage Hour Rept. 262 (W. D. Tenn., 1942)).

(d) By failing to pay to its lumber stackers who were compensated on a piece-rate basis and who were engaged in the production of goods for interstate commerce, overtime compensation at rates not less than one and one-half times their regular rates of pay, computed as hereinabove indicated, for hours worked in excess of 44 per week during the period from October 24, 1938, through October 23, 1939; for hours worked in excess of 42 per week during the period from October 24, 1939, through October 23, 1940; and for hours in excess of 40 per week since October 24, 1940, defendant has violated Sections 7 and 15 (a) (2) of the Fair Labor Standards Act of 1938.

(e) The defendant has violated Sections 11 (c) and 15 (a) (5) of the Fair Labor Standards Act of 1938 by its failure to make, keep and preserve records setting forth the information required to be recorded by regulations of the Administrator which became effective October 21, 1938, and amendments thereto; and, more particularly, by its failure, with respect to the employments of lumber stackers, to show adequately; (1) the hours worked each workday and each workweek, (2) the total straight time earnings for each workweek, and (3) the total weekly overtime compensation (29 U. S. C. Sec. 211 (c),

Sec. 215 (a)(5); *Code of Federal Regulations*, Tit. 29, Ch. V. Part 516).

(f) The defendant has transported, offered for transportation, shipped, delivered and sold in interstate commerce goods in the production of which employees, engaged in the stacking of lumber, were employed in violation of Section 7 of the Fair Labor Standards Act of 1938, contrary to the provisions of Section 15 (a) (1) of the said Act (29 U. S. C. Sec. 215 (a) (1)).

(g) Since September 21, 1943, the defendant has been in compliance with the requirements of Section 7 of the Fair Labor Standards Act of 1938, with respect to its lumber stackers, by compensating such employees for regular and overtime hours in the manner provided in the wage agreements entered into on that date.

X

Plaintiff further moves the Court to amend its Conclusions of Law by adding the following additional Conclusion of Law in the event the Court declines to strike the first sentence of Finding of Fact No. 9, as requested in Section VII hereinabove:

"Defendant, in failing to pay its lumber stackers overtime compensation after the suit was filed, violated Section 7 of the Fair Labor Standards Act of 1938 with respect to such employees since the "advance" system, discussed under Finding of Fact No. 9, did not result in a compliance with the provisions of said Section 7" *Walling* v. *Green Head Bit & Supply Company*—F. (2d) — [C. C. A. 10th, Oct. 22, 1943].

XI

Plaintiff further moves the Court that a hearing be had on plaintiff's motion that the Findings of Fact and Conclusions of Law be amended in the above respects; and prays the Court to enter an order setting the matter down for a hearing.

Dated: November 3, 1943.

DOUGLAS B. MAGGS,
*Solicitor,*
IRVING J LEVY,
*Associate Solicitor,*
AMZY B. STEED,
*Acting Regional Attorney,*
JACK H. MCGUIRE,
*Associate Attorney,*
*United States Department of Labor,*
*Attorneys for Plaintiff.*

The undersigned, as an attorney of the plaintiff in the foregoing action, certifies that a copy of the foregoing motion has been served on Ball and Ball, Attorneys for Defendant, by this day mailing said copy, properly addressed to them, postage prepaid, to the address of First National Bank Building, Montgomery, Alabama.

AMZY B. STEED,
*Attorney for Plaintiff.*

This November 3, 1943.
Filed Nov. 4, 1943. O. D. Street, Jr., Clerk.

*Order*

This cause came on to be heard on November 9, 1943, on motion of plaintiff to amend the Findings of Fact and Conclusions of Law heretofore filed in the above-entitled action, plaintiff and defendant being represented by counsel, and same having been argued orally by counsel and considered by the Court,

It is hereby ordered that the Findings of Fact be amended as follows:

1. That the word "substantially" be deleted from Finding of Fact No. 2, so that the amended Finding of Fact No. 2 will read as follows:

"2. The defendant has at all times since the effective date of the Act been manufacturing lumber for shipment in interstate commerce and subject to the Act."

2. That, in the second sentence of Finding of Fact No. 9, the words "on September 21, 1943" be inserted after the phrase "Prior to the trial" and before the words "the defendant abandoned" so that the amended second sentence of Finding of Fact No. 9 will read as follows:

"Prior to the trial, on September 21, 1943, the defendant abandoned its piece rate basis and entered into a contract with its stackers by which it agreed to pay them on an agreed hourly basis of thirty-five cents per hour, the legal rate, with time and a half for all overtime worked and with a guarantee that if the amount of lumber stacked, figured on an agreed piece basis, exceeded the amount payable on the hourly basis, that the stacker would then be paid an additional amount so that under this arrangement the stacker would in any event be paid for time and overtime with the possibility of receiving additional compensation, depending upon the amount of lumber stacked."

It is ordered that no further amendments to the Findings of Fact be made and that each and every ground of plaintiff's motion seeking such additional amendments be and the same are hereby overruled; and

It is further ORDERED that no additional Conclusions of Law be made or entered and that each and every ground of plaintiff's motion seeking the entry of such additional Conclusions of Law be and the same are hereby overruled.

Done, this 12 day of November 1943.

C. B. KENNAMER,
*United States District Judge.*

Filed Nov. 12, 1943. O. D. Street, Jr., Clerk. By C. E. Smith, Deputy.

*Notice of appeal*

Notice is hereby given that L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Fifth Circuit from the final judgment entered in this action on October 25, 1943, as amended by the order on plaintiff's motion for amendment of findings of fact and conclusions of law entered on November 12, 1943.

DOUGLAS B. MAGGS,
*Solicitor,*

ARCHIBALD COX,
*Associate Solicitor,*

BESSIE MARGOLIN,
*Assistant Solicitor,*

HUGH MCCLOSKEY
*Supervising Attorney,*

AMZY B. STEED,
*Acting Regional Attorney,*
*Office of the Solicitor,*
*U. S. Department of Labor, Washington 25, D. C.*

Dated: January 19, 1944.

Post Office Address: % Wage and Hour Division, 1007 Comer Building, Birmingham 3, Alabama.

Filed Jan. 22, 1944. O. D. Street, Jr., Clerk. By Annie Schoolar, Deputy Clerk.

*Designation of record and proceedings to be contained in the record*

*To the Clerk of the above-named Court:*

In accordance with Rule 75 (a) of the Federal Rules of Civil Procedure, you are hereby requested to make a transcript of the record to be filed in the United States Circuit Court of Appeals for the Fifth Circuit, pursuant to the notice of appeal filed in the above-entitled cause, and to include in such transcript the complete record and all the proceedings and evidence in this action.

Dated January 19, 1944.

DOUGLAS B. MAGGS,
*Solicitor,*
ARCHIBALD COX,
*Associate Solicitor,*
BESSIE MARGOLIN,
*Assistant Solicitor,*
HUGH MCCLOSKEY,
*Supervising Attorney,*
AMZY B. STEED,
*Acting Regional Attorney.*

CITY OF WASHINGTON,
*District of Columbia, ss:*

Personally appeared the undersigned, Hugh McCloskey, who on oath, duly administered according to law, says:

That he has served a copy of the foregoing request of designation of the record on the attorney for defendant by placing the same in an envelope, properly addressed to Fred S. Ball, Esquire, of the firm of Ball & Ball, First National Bank Building, Montgomery, Alabama, the envelope being a franked envelope used by the Government and properly marked for air mail delivery, and depositing said envelope on the 19th day of January 1944 at 5:15 o'clock p. m. in a United States mail box, maintained for the purpose of receiving mail and located at the corner of Constitution Avenue and 14th Streets in the City of Washington, District of Columbia.

HUGH MCCLOSKEY.

Sworn to and subscribed before me, this 19th day of January 1944.

ELSIE E. SCHWARZ,
*Notary Public, District of Columbia.*

My commission expires 2-29-48.

Filed Jan. 22, 1944. O. D. Street, Jr., Clerk. By Annie Schoolar, Deputy Clerk.

*Stipulation*

It is hereby stipulated by and between the parties herein, through their counsel, as follows:

1. During the course of the preparation of the transcript of the record on appeal in this action, the parties have delivered to the clerk of the court, for inclusion in the record on appeal, copies of the original exhibits which were introduced during the trial. The original exhibits, from which these copies were made, are not on file in the office of the clerk of the court and the clerk has suggested that the parties enter into a stipulation showing that the copies of such exhibits which have been deposited with the clerk are true and correct copies of said original exhibits. Accordingly, it is hereby stipulated and agreed that the copies of said exhibits which have been lodged with the clerk are true and correct copies of the original exhibits which were introduced during the trial.

AMZY B. STEED,
*Associate Attorney,*
*United States Department of Labor,*
*Attorneys for Plaintiff.*

FRED S. BALL, Jr.,
*Attorney for Defendant.*

Filed February 25, 1944. O. D. Street, Jr., Clerk. By Annie Schoolar, Deputy Clerk.

DEFENDANT'S EXHIBIT 1

April 6, 1942 thru April 18, 1942

| | Wage and hour rate | Paid piece rate (2 weeks) |
|---|---|---|
| John Taylor, 94 hours | 28.00+7.35=35.35 | 59.73 |
| Bob Noye, 86 hours | 28.00+3.15=31.15 | 53.46 |

May 4, 1942 thru May 16, 1942

| | | |
|---|---|---|
| Jay Houser; 86 hours | 28.00+3.15=31.15 | 56.25 |
| Rosbell Lamar, 86 hours | 28.00+3.15=31.15 | 39.15 |

June 1, 1942 thru June 13, 1942

| | | |
|---|---|---|
| John Taylor, 87 hours | 28.00+3.68=31.68 | 37.98 |
| Joe B. Hauser, 87 hours | 28.00+3.68=31.68 | 35.82 |

Aug. 10, 1942 thru Aug. 22, 1942

| | Wage and hour rate | Paid piece rate (2 weeks) |
|---|---|---|
| Clifton Holmes, 83 hours | 28.00+1.58=29.58 | 43.79 |
| Edd Hall, 83 hours | 28.00+1.58=29.58 | 46.71 |

Sept. 7, 1942 thru Sept. 19, 1942

| | | |
|---|---|---|
| Joe B. Hauser (140 T.), 94 hours | 28.00+7.35=35.35 | 46.44 |
| Edd Hall (80 T.) 64 hours | 19.60+4.20=23.80 | 45.17 |

Oct. 5, 1942 thru Oct. 17, 1942

| | | |
|---|---|---|
| John Taylor, 68 hours | 23.80 | 47.61 |
| Clifton Holmes, 73 hours | 25.55 | 47.61 |

DEFENDANT'S EXHIBIT 2

I, the undersigned employee of Youngerman-Reynolds Hardwood Company, Inc. being advised that some question has been raised as to whether I have been paid for my work done for said company in accordance with the Fair Labor Standards Act sometimes called the Wage and Hour Law, do hereby certify and acknowledge that I have kept account of the time that I worked for the company and have kept an account of the amount of lumber which I have stacked for the company during the period that I have been working for them since the Fair Labor Standards Act or Wage and Hour Law went into effect, and that I have been paid in full for all time I have worked and I have no complaint to make in that or any other connection.

I further certify that it is customary for lumber stackers to work on a piece-work basis and not by the hour. Neither I nor the other stackers would be willing to work on an hourly wage basis and the only way we would be willing to stack lumber would be on a piece-work basis. In this way we can work during the cooler part of the day in the morning and in the afternoon and we can get paid more that way than working by the hour. I am fully satisfied and content with the pay I have been getting for my work and I have been paid in full for all time or any overtime that I may have worked.

I have signed this statement of my own free will and accord after having read the same or having the same read to me.

Witness: E. J. HALL.
J. L. WILLETTE. Ed. Hall.

DEFENDANT'S EXHIBIT 3

STATE OF ALABAMA,
*County of Geneva:*

Personally appeared before me, J. L. Willette, a Notary Public in and for said State and County, Ed. Hall, a Lumber Stacker, who being by me first duly sworn, deposes and says:

I am an employee of the Youngerman-Reynolds Hardwood Company, at Samson, in Geneva County, Alabama, and have been so employed for 120 months. During my employment I have been paid in strict accordance with the Fair Labor Standard Act of the United States and have worked in accordance with the Wages and Hours provided by said act. In all cases where I have been called upon to make overtime, I have been paid fully for all such overtime. In all cases where any difference arose as to actual time put in and the time credited to me, upon presenting this to the Foreman we have adjusted it immediately with the Company. I have always been treated fairly by this Company, and know that they are complying with the act.

I hereby give my consent for the use of this affidavit as testimony in any case that might arise under said act, or in any other way the Youngerman-Reynolds Hardwood Company may see fit to use it.

This statement is made freely and I stand ready and willing to testify to the facts herein in any court of law.

ED. HALL.

Subscribed and sworn to before me this the 19th day of October 1942.

[SEAL] J. L. WILLETTE,
*Notary Public.*

DEFENDANTS EXHIBIT 4

EMPLOYMENT AGREEMENT

Whereas, the undersigned employee of Youngerman-Reynolds Hardwood Company, hereinafter called the company, has been working as a stacker for the company for some time and the work was done on a piece-work basis because of the fact that said employee was not willing to work on an hourly basis; and

Whereas, the piece-work basis was understood both by the employee and the company to include additional compensation for any overtime hours worked; and the employee has been fully paid all amounts due him up to the last pay day

and the parties desire to put in writing the agreement which has at all times been understood between them;

Now, therefore, it is agreed between the company and the employee that the agreement as to the basis of pay is as follows:

The basic or regular rate of pay is 35¢ per hour for the first forty hours each week and for time over forty hours each week the pay shall not be less than one and one-half times such basic or regular rate above mentioned with a guaranty that the employee shall receive weekly for regular time and for such overtime as the employee may work a sum arrived at as follows:—

The amount of stacking done by said employee shall be figured on the basis of 80¢ per thousand board feet of lumber for flat stacking and 70¢ per thousand board feet of lumber ricked.

In witness whereof, the parties have entered into this agreement on this 21 day of September 1943.

YOUNGERMAN-REYNOLDS HARDWOOD COMPANY,
By G. C. YOUNGERMAN, Employer,
*As its President.*

JOHN (his X mark) TAYLOR, *Employee.*

Witness:
J. L. WILLETTE.
J. B. LOGAN.

## DEFENDANTS EXHIBIT 5

### EMPLOYMENT AGREEMENT

Whereas, the undersigned employee of Youngerman-Reynolds Hardwood Company, hereinafter called the company, has been working as a stacker for the company for some time and the work was done on a piece-work basis because of the fact that said employee was not willing to work on an hourly basis; and

Whereas, the piece-work basis was understood both by the employee and the company to include additional compensation for any overtime hours worked; and the employee has been fully paid all amounts due him up to the last pay day and the parties desire to put in writing the agreement which has at all times been understood between them;

Now, therefore, it is agreed between the company and the employee that the agreement as to the basis of pay is as follows:

The basic or regular rate of pay is 35¢ per hour for the first forty hours each week and for time over forty hours each week

the pay shall not be less than one and one-half times such basic or regular rate above mentioned with a guaranty that the employee shall receive weekly for regular time and for such overtime as the employee may work a sum arrived at as follows:

The amount of stacking done by said employee shall be figured on the basis of 80¢ per thousand board feet of lumber for flat stacking and 70¢ per thousand board feet of lumber ricked.

In witness whereof, the parties have entered into this agreement on this 21 day of September 1943.

YOUNGERMAN-REYNOLDS HARDWOOD COMPANY,
By G. C. YOUNGERMAN, Employer,
*As its President.*

CLIFTON (his X mark) HOLMES, *Employee.*

Witness:

J. L. WILLETTE.
J. B. LOGAN.

DEFENDANT EXHIBIT 6

EMPLOYMENT AGREEMENT

Whereas, the undersigned employee of Youngerman-Reynolds Hardwood Company, hereinafter called the company, has been working as a stacker for the company for some time and the work was done on a piece-work basis because of the fact that said employee was not willing to work on an hourly basis; and

Whereas, the piece-work basis was understood both by the employee and the company to include additional compensation for any overtime hours worked; and the employee has been fully paid all amounts due him up to the last pay day and the parties desire to put in writing the agreement which has at all times been understood between them;

Now, therefore, it is agreed between the company and the employee that the agreement as to the basis of pay is as follows:

The basic or regular rate of pay is 35¢ per hour for the first forty hours each week and for time over forty hours each week the pay shall not be less than one and one-half times such basic or regular rate above mentioned with a guaranty that the employee shall receive weekly for regular time and for such overtime as the employee may work a sum arrived at as follows:

The amount of stacking done by said employee shall be figured on the basis of 80¢ per thousand board feet of lumber for flat stacking and 70¢ per thousand board feet of lumber ricked.

In witness whereof, the parties have entered into this agreement on this 21 day of September 1943.

YOUNGERMAN-REYNOLDS HARDWOOD COMPANY,
By G. C. YOUNGERMAN, *Employer,*
*As Its President.*
CLAYTON (his x mark) CARTER, *Employee.*

Witness to sig.:
J. L. WILLETTE.
J. B. LOGAN.

## *Motion*

Comes now the plaintiff and shows unto the Court that on January 22, 1944, the plaintiff filed herein a notice of entry of appeal; that in his designation of records to be contained in the record on appeal, he included all records and proceedings and evidence in the action; that, to prevent a lengthy and encumbered record, the parties have agreed, as more fully appears from a stipulation this day entered into, that, in lieu of including in the record on appeal the daily time sheets, introduced in evidence as Plaintiff's Exhibit No. 1, and the permanent time and pay-roll records, introduced in evidence as Plaintiff's Exhibit No. 2, the Clerk shall include the compilation, to be designated as Plaintiff's Exhibit No. 1, which said compilation is attached to the aforesaid stipulation and relates solely to the wages and hours of lumber stackers.

Wherefore, plaintiff moves the Court for an order directing the transmittal of said compilation to the Appellate Court in lieu of said daily time sheets and permanent time and pay-roll records.

Dated: February 23, 1944.

DOUGLAS B. MAGGS,
*Solicitor*
ARCHIBALD COX,
*Associate Solicitor,*
AMZY B. STEED,
*Acting Regional Attorney,*
JACK H. MCGUIRE,
*Associate Attorney,*
*United States Department of Labor.*
*Attorneys for Plaintiff.*

ORDER

It appearing to the Court from plaintiff's foregoing motion that, in order to prevent an encumbered record, the parties have agreed that, in lieu of including in the record on appeal the daily

time sheets, introduced in evidence as Plaintiff's Exhibit No. 1, and the permanent time and pay-roll records, introduced in evidence as Plaintiff's Exhibit No. 2, there should be included in said record on appeal a compilation, to be designated as Plaintiff's Exhibit No. 1, which was prepared by the parties and which relates solely to the wages and hours of lumber stackers, upon consideration whereof

It is hereby ordered and adjudged that said compilation shall be designated Plaintiff's Exhibit No. 1, and shall be transmitted to the Appellate Court in lieu of said daily time sheets and pay-roll records; and it is

Further ordered and adjudged that the stipulation, this day entered into by and between the parties, with respect to the transmission of said compilation to the Appellate Court, be, and it hereby is, incorporated in and made a part of this Order, and that the parties be, and they hereby are, bound by all agreements contained therein.

Done and ordered at Montgomery, Alabama, this 25th day of February 1944.

C. B. KENNAMER,
*United States District Judge.*

Filed February 25, 1944. O. D. Street, Jr., Clerk. By Annie Schoolar, Deputy Clerk.

In the District Court of the United States for the Middle District of Alabama, Northern Division

Civil Action—File No. 238–M

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, PLAINTIFF

*vs.*

YOUNGERMAN-REYNOLDS HARWOOD COMPANY, INC., DEFENDANT

*Stipulation*

It is hereby stipulated by and between the parties herein, through their counsel, as follows:

I

There was offered in evidence a great mass of records kept by the defendant of the time worked and amount paid its

employees during the years 1940, 1941, 1942, and 1943, up until the date of the trial. These records consisting of daily time sheets and the defendant's permanent office records contained data concerning not only the stackers but also all of the other employees of the mill. In order to eliminate unnecessary material from the record concerning the employees who were not stackers and in order to eliminate from the record a mass of evidence with reference to the years 1940 and 1941 as to matters not in dispute and in order to shorten the record, the parties have prepared a compilation which shall be substituted in the record in lieu of plaintiff's Exhibit Number 1, and said compilation is attached hereto. This compilation covers the period from January 1, 1942, to September 1, 1943. The records from which this compilation was made showed in each instance, except where the number of hours is left blank, the name of the employee, the number of hours worked each day, and the amount paid and the basis upon which the payment was made.

II

It is agreed that the defendant's records for the years 1940 and 1941 showed the name of each stacker employed, the hours worked by each stacker each workday and each workweek and the amount paid each employee, and the basis upon which said payment was made during said years with the exception of a period of approximately eight months in 1941. It is agreed that there was oral testimony to the effect that although the office sheets did not show the time for said eight months' period that there were time books kept at the mill showing the hours worked during most of this period.

III

It is further agreed that the records show that during most of the year 1940 the stackers were taken off of the per thousand basis and were put on an hourly basis and were paid time and a half for all overtime worked.

IV

It is further agreed that the records show that during 1941 from January to May the stackers were not worked any overtime and from May to the end of the year there was little, if any, overtime worked.

V

It is further agreed that during all of the years in question that the records show that where overtime was worked the

amount which was paid the stackers exceeded the statutory minimum of time and overtime.

VI

From and after the approximate time of the filing of this suit, the defendant's records show that its daily time sheets showing the hours worked and the amount payable on a piece-rate basis were continued the same as before but the information contained on these records was not transferred to its permanent records and there was an additional sheet attached to each time sheet showing the days and hours worked and the amount of time and overtime calculated on the basis of the minimum rate but the records show that the defendant continued to pay the amount shown on the piece rate records.

VII

It is agreed further that the plaintiff will move the District Court for an order directing the Clerk to transmit as a part of the record on appeal the aforementioned compilation, which said compilation shall be designated as plaintiff's Exhibit Number 1 and shall be included, as aforesaid, in the record on appeal in lieu of the daily time sheets, introduced in evidence as plaintiff's Exhibit Number 1, and the permanent time and pay-roll records, introduced in evidence as plaintiff's Exhibit Number 2.

Dated: February 23, 1944.

DOUGLAS B. MACGS,
*Solicitor,*

ARCHIBALD COX,
*Associate Solicitor,*

AMZY B. STEED,
*Acting Regional Attorney,*

JACK H. MCGUIRE,
*Associate Attorney,*
*United States Department of Labor,*
*Attorneys for Plaintiff.*

BALL & BALL,
FRED S. BALL,
*Attorneys for Defendants.*

Filed February 25, 1944. O. D. Street, Jr., Clerk. By Annie Schoolar, Deputy Clerk.

## PLAINTIFF'S EXHIBIT No. 1

### 1942

| Week ending | Name | Hours worked | Amount paid | Basis |
|---|---|---|---|---|
| 1/18 | Phillip Edwards | 40 | $72.00 | ½ of {140,700 @ .80 = $84.28; 99,300 @ .62 = 60.72} |
| 1/25 | do | 40 | | |
| 1/18 | John Taylor | 40 | 72.00 | ½ of {140,700 @ .60 = 84.28; 99,300 @ .62 = 60.72} |
| 1/25 | do | 40 | | |
| 1/18 | Jay Hauser | 40 | 57.33 | ½ of {131,900 @ .62 = 79.14; 52,200 @ .60 = 35.52} |
| 1/25 | do | 40 | | |
| 1/18 | Glover Russell | 40 | 57.33 | ½ of {131,900 @ .62 = 79.14; 52,200 @ .60 = 35.52} |
| 1/25 | do | 40 | | |
| 1/18 | Abraham Russell | 40 | 56.25 | ½ of {125,900 @ .62 = 75.54; 61,600 @ .60 = 36.96} |
| 1/25 | do | 40 | | |
| 1/18 | Eugene Cole | 40 | 37.77 | ½ of 125,900 @ .60 = 75.54 |
| 1/24 | Lorenzo Poon | 40 | 18.48 | ½ of 61,900 @ .60 = 36.96 |
| 1/31 | Glover Russell | 43 | 33.72 | ½ of 112,400 @ .60 = 67.44 |
| 2/7 | do | 40 | | |
| 1/31 | Jay Hauser | 43 | 33.72 | ½ of 112,400 @ .60 = 67.44 |
| 2/7 | do | 40 | | |
| 1/31 | Eugene Cole | 43 | 30.96 | ½ of 103,200 @ .60 = 61.92 |
| 2/7 | do | 40 | | |
| 1/31 | Abraham Russell | 43 | 30.96 | ½ of 103,200 @ .60 = 61.92 |
| 2/7 | do | 40 | | |
| 1/31 | John Taylor | 43 | 50.82 | ½ of 169,400 @ .60 = 101.64 |
| 2/7 | do | 40 | | |
| 1/31 | Phillip Edwards | 43 | 50.82 | ½ of 169,400 @ .60 = 101.64 |
| 2/7 | do | 40 | | |
| 2/14 | Glover Russell | 37 | 11.13 | ½ of 37,100 @ .60 = 22.26 |
| 2/21 | do | | | |
| 2/14 | Jay Hauser | 37 | 11.13 | ½ of 37,100 @ .60 = 22.26 |
| 2/21 | do | | | |
| 2/14 | Eugene Cole | 43 | 26.49 | ½ of {22,900 @ .60 = 6.87; 65,400 @ .60 = 39.24} |
| 2/21 | do | 41 | | |
| 2/14 | Abraham Russell | 43 | 6.87 | ½ of 22,900 @ .60 = 13.74 |
| 2/21 | Clifton Holmes | 41 | 19.62 | ½ of 65,400 @ .60 = 39.24 |
| 2/14 | John Taylor | 43 | 42.45 | ½ of 141,500 @ .60 = 84.90 |
| 2/21 | do | 41 | | |
| 2/14 | Phillip Edwards | 43 | 42.45 | ½ of 141,500 @ .60 = 84.90 |
| 2/21 | do | 41 | | |
| 2/21 | Roswell Lamar | | 6.12 | ½ of 20,400 @ .60 = 12.24 |
| 2/21 | Lorenzo Poon | | 6.12 | ½ of 20,400 @ .60 = 12.24 |
| 2/28 | Bob Noy | 23 | 27.66 | ½ of 92,200 @ .60 = 55.32 |
| 3/7 | do | 20 | | |
| 3/7 | Bob Noy (mill work) | 6 | 2.10 | 35¢ per hour |
| 2/28 | Rochell Lamar | 23 | 27.66 | ½ of 92,200 @ .60 = 55.32 |
| 3/7 | do | 20 | | |
| 2/28 | John Taylor | 36 | 36.03 | ½ of 120,100 @ .60 = 72.06 |
| 3/7 | do | 32 | | |
| 2/28 | Phillip Edwards | 39 | 36.03 | ½ of 120,100 @ .60 = 72.06 |
| 3/7 | do | 32 | | |
| 3/14 | Rochell Lamar | 43 | 36.06 | ½ of 120,200 @ .60 = 72.12 |
| 3/21 | do | 45 | | |
| 3/14 | Rochell Lamar (mill work) | 5 | 1.75 | 35¢ per hour |
| 3/21 | do | 4 | 1.40 | 35¢ per hour |
| 3/14 | Bob Noy | 43 | 36.06 | ½ of 120,200 @ .60 = 72.12 |
| 3/21 | do | 45 | | |
| 3/14 | John Taylor | 48 | 48.72 | ½ of 162,400 @ .60 = 97.44 |
| 3/21 | do | 48 | | |
| 3/14 | Phillip Edwards | 48 | 48.72 | ½ of 162,400 @ .60 = 97.44 |
| 3/21 | do | 48 | | |
| 3/28 | Bob Noy | 32 | 37.44 | ½ of 124,800 @ .60 = 74.88 |
| 4/4 | do | | | |
| 3/28 | Bob Noy (mill work) | 17 | 8.50 | 35¢ per hour |
| 3/28 | Rochell Lamar | 48 | 37.44 | ½ of 124,800 @ .60 = 74.88 |
| 4/4 | do | 48 | | |
| 3/28 | John Taylor | 48 | 42.12 | ½ of 140,400 @ .60 = 84.24 |
| 4/4 | do | 48 | | |
| 3/28 | Phillip Edwards | 48 | 42.12 | ½ of 140,400 @ .60 = 84.24 |
| 4/4 | do | 48 | | |
| 4/11 | Bob Noy | 46 | 53.46 | ½ of 178,200 @ .60 = 106.92 |
| 4/18 | do | 48 | | |
| 4/11 | Rochell Lamar | 38 | 53.46 | ½ of 178,200 @ .60 = 106.92 |
| 4/18 | do | 48 | | |
| 4/11 | John Taylor | 46 | 59.73 | ½ of 199,100 @ .60 = 119.46 |
| 4/18 | do | 48 | | |

[1] Number of feet *B* lumber stacked.

## 1942—Continued

| Week ending | Name | Hours worked | Amount paid | Basis | |
|---|---|---|---|---|---|
| 4/11 | Jay Hauser | | | | |
| 4/18 | do | 48 | $39.73 | ½ of 199,100 @ $0.60 | = $119.46 |
| 4/25 | Rochell Lamar | 41 | 56.85 | ½ of 189,500 @ .60 | = 113.70 |
| 5/2 | do | 48 | | | |
| 4/25 | Joe B. Houser | 40 | 56.85 | ½ of 189,500 @ .60 | = 113.70 |
| 5/2 | do | 40 | | | |
| 4/25 | John Taylor | 40 | 66.18 | ½ of 220,600 @ .60 | = 132.36 |
| 5/2 | do | 48 | | | |
| 4/25 | Jay Hauser | 40 | 66.18 | ½ of 220,600 @ .60 | = 132.36 |
| 5/2 | do | 48 | | | |
| 4/25 | Rochell Lamar | 41 | 56.85 | ½ of 189,500 @ .60 | = 113.70 |
| 5/2 | do | 48 | | | |
| 4/25 | Joe B. Houser | 40 | 56.85 | ½ of 189,500 @ .60 | = 113.70 |
| 5/2 | do | | | | |
| 5/2 | Joe B. Houser (mill work) | 12½ | 4.37 | | 35¢ per hour |
| 5/9 | John Taylor | 46 | 56.25 | ½ of 185,500 @ .60 | = 112.50 |
| 5/16 | do | 40 | | | |
| 5/9 | Jay Hauser | 46 | 56.25 | ½ of 185,500 @ .60 | = 112.50 |
| 5/16 | do | 40 | | | |
| 5/9 | Rochell Lamar | 46 | 39.15 | ½ of 130,500 @ .60 | = 78.30 |
| 5/16 | do | 40 | | | |
| 5/9 | Joe B. Houser | 46 | 39.15 | ½ of 130,500 @ .60 | = 78.30 |
| 5/16 | do | 40 | | | |
| 5/23 | John Taylor | 45 | 67.35 | ½ of 224,500 @ .60 | = 134.70 |
| 5/30 | do | 48 | | | |
| 5/23 | Jay Hauser | 37 | 67.35 | ½ of 224,500 @ .60 | = 134.70 |
| 5/30 | do | 48 | | | |
| 5/23 | Rochell Lamar | 45 | 31.95 | ½ of 106,500 @ .60 | = 63.90 |
| 5/30 | do | 40 | | | |
| 5/30 | Rochell Lamar (mill work) | 5 | 1.75 | | 35¢ per hour |
| 5/23 | Joe B. Houser | 45 | 31.95 | ½ of 106,500 @ .60 | = 63.90 |
| 5/30 | do | 40 | | | |
| 5/30 | do | 5 | 1.75 | | 35¢ per hour |
| 6/6 | John Taylor | 43 | 37.98 | ½ of 126,600 @ .60 | = 75.96 |
| 6/13 | do | 43 | | | |
| 6/6 | Jay Hauser | 43 | 37.98 | ½ of 126,600 @ .60 | = 75.96 |
| 6/13 | do | 43 | | | |
| 6/6 | Rochell Lamar | 43 | 35.82 | ½ of 119,400 @ .60 | = 71.64 |
| 6/13 | do | 43 | | | |
| 6/6 | Joe B. Houser | 43 | 35.82 | ½ of 119,400 @ .60 | = 71.64 |
| 6/13 | do | 43 | | | |
| 6/20 | John Taylor | 44 | 47.64 | ½ of 158,800 @ .60 | = 95.28 |
| 6/27 | do | 37 | | | |
| 6/20 | Jay Hauser | 44 | 47.64 | ½ of 158,800 @ .60 | = 95.28 |
| 6/27 | do | 37 | | | |
| 6/20 | Rochell Lamar | 44 | 35.52 | ½ of 118,400 @ .60 | = 71.04 |
| 6/27 | do | 37 | | | |
| 6/20 | Joe B. Houser | 44 | 35.52 | ½ of 118,400 @ .60 | = 71.04 |
| 6/27 | do | 37 | | | |
| 6/20 | do | 11 | 3.85 | | 35¢ per hour |
| 6/27 | do | 7½ | 2.62 | | 35¢ per hour |
| 7/4 | John Taylor | 36 | 27.52 | ½ of { 34,300 @ .10 / 86,000 @ .60 | = 3.43 / = 51.60 |
| 7/11 | do | | | | |
| 7/4 | Clifton Holmes | | 27.52 | ½ of { 34,300 @ .10 / 86,000 @ .60 | = 3.43 / = 51.60 |
| 7/11 | do | | | | |
| 7/4 | Rochell Lamar | 36 | 24.08 | ½ of { 44,800 @ .10 / 72,800 @ .60 | = 4.48 / = 43.68 |
| 7/11 | do | | | | |
| 7/4 | Joe B. Houser | 36 | 24.08 | ½ of { 44,800 @ .10 / 72,800 @ .60 | = 4.48 / = 43.68 |
| 7/11 | do | | | | |
| 7/18 | John Taylor | 48 | 47.57 | ½ of { 152,300 @ .60 / 37,500 @ .10 | = 91.38 / = 3.75 |
| 7/25 | do | 48 | | | |
| 7/18 | Eugene Cole | 48 | 47.57 | ½ of { 152,300 @ .60 / 37,500 @ .10 | = 91.38 / = 3.75 |
| 7/25 | Jim Shepherd | 48 | | | |
| 7/18 | Rochell Lamar | 48 | 52.57 | ½ of { 152,000 @ .60 / 139,400 @ .10 | = 91.20 / = 13.94 |
| 7/25 | do | 48 | | | |
| 7/18 | Joe B. Houser | 48 | 52.57 | ½ of { 152,000 @ .60 / 139,400 @ .10 | = 91.20 / = 13.94 |
| 7/25 | do | 48 | | | |
| 7/31 | John Taylor | 48 | 49.80 | ½ of { 36,000 @ .70 / 124,000 @ .60 | = 25.20 / = 74.40 |
| 8/8 | do | 45 | | | |
| 7/31 | Clifton Holmes | 48 | 49.80 | ½ of { 36,000 @ .70 / 124,000 @ .60 | = 25.20 / = 74.40 |
| 8/8 | do | 45 | | | |
| 7/31 | Rochell Lamar | 48 | 64.49 | ½ of { 162,900 @ .70 / 24,900 @ .60 | = 114.03 / = 14.94 |
| 8/8 | do | 43 | | | |
| 7/31 | Joe B. Houser | 48 | 64.49 | ½ of { 162,900 @ .70 / 24,900 @ .60 | = 114.03 / = 14.94 |
| 8/8 | do | 43 | | | |

## 1942—Continued

| Week ending | Name | Hours worked | Amount paid | Basis |
|---|---|---|---|---|
| 7/31 | Lorenzo Poon | 43 | | |
| 8/8 | do | 34 | $11.91 | |
| 7/31 | Bob Noy | 43 | | |
| 8/8 | do | 20 | 7.00 | |
| 8/15 | John Taylor | 44 | 43.79 | ½ of 74,900 @ $0.60 = $44.94 |
| 8/22 | do | 43 | | 60,900 @ .70 = 42.63 |
| 8/15 | Clifton Holmes | 44 | 43.79 | ½ of 74,900 @ .60 = 44.94 |
| 8/22 | do | 43 | | 60,900 @ .70 = 42.63 |
| 8/15 | Ed Hall | 44 | 46.71 | ½ of 10,800 @ .60 = 6.48 |
| 8/22 | do | 43 | | 124,200 @ .70 = 86.94 |
| 8/15 | Joe B. Hauser | 44 | 46.71 | ½ of 10,800 @ .60 = 6.48 |
| 8/22 | do | 43 | | 124,200 @ .70 = 86.94 |
| 8/29 | John Taylor | 44 | 49.78 | ½ of 103,400 @ .60 = 62.04 |
| 9/5 | do | 44 | | 53,600 @ .70 = 37.52 |
| 8/29 | Clifton Holmes | 44 | 49.78 | ½ of 103,400 @ .60 = 62.04 |
| 9/5 | do | 44 | | 53,600 @ .70 = 37.52 |
| 8/29 | Ed Hall | 44 | 48.04 | ½ of 22,800 @ .60 = 13.68 |
| 9/5 | do | 44 | | 117,700 @ .70 = 82.39 |
| 8/29 | Joe Houser | 44 | 48.04 | ½ of 22,800 @ .60 = 13.68 |
| 9/5 | do | 44 | | 117,700 @ .70 = 82.39 |
| 9/12 | John Taylor | 46 | 22.93 | ½ of 14,600 @ .60 = 8.76 |
| 9/19 | do | 22 | | 53,000 @ .70 = 37.10 |
| 9/12 | Clifton Holmes | 46 | 22.93 | ½ of 14,600 @ .60 = 8.76 |
| 9/19 | do | 22 | | 53,000 @ .70 = 37.10 |
| 9/12 | Ed Hall | | 45.17 | 4,350 @ .60 = 2.61 |
| 9/19 | do | 48 | | 60,800 @ .70 = 42.56 |
| 9/12 | Joe B. Houser | 46 | 46.44 | 6,350 @ .60 = 3.81 |
| 9/19 | do | 48 | | 60,900 @ .70 = 42.63 |
| 9/12 | Eugene Cole | 35 | 19.40 | 2,000 @ .60 = 1.20 |
| 9/19 | do | 48 | | 26,000 @ .70 = 18.20 |
| 9/12 | Bob Noy | | 18.13 | 25,900 @ .70 = 18.13 |
| 9/19 | do | 48 | | |
| 9/26 | John Taylor | 29 | 26.62 | ½ of 61,100 @ .60 = 36.66 |
| 10/3 | do | | | 23,700 @ .70 = 16.59 |
| 9/26 | Clifton Holmes | 28 | 26.62 | ½ of 61,100 @ .60 = 36.66 |
| 10/3 | do | | | 23,700 @ .70 = 16.59 |
| 9/26 | Ed Hall | 38 | 37.09 | ½ of 24,000 @ .60 = 14.40 |
| 10/3 | do | | | 85,400 @ .70 = 59.78 |
| 9/26 | Joe B. Houser | 38 | 37.09 | ½ of 24,000 @ .60 = 14.40 |
| 10/3 | do | | | 85,400 @ .70 = 59.78 |
| 10/10 | John Taylor | 36 | 47.61 | ½ of 132,700 @ .60 = 79.62 |
| 10/17 | do | 40 | | 22,300 @ .70 = 15.61 |
| 10/10 | Clifton Holmes | 41 | 47.61 | ½ of 132,700 @ .60 = 79.62 |
| 10/17 | do | 40 | | 22,300 @ .70 = 15.61 |
| 10/10 | Ed Hall | 35 | 45.87 | ½ of 22,700 @ .60 = 13.62 |
| 10/17 | do | 40 | | 111,600 @ .70 = 78.12 |
| 10/10 | Eugene Cole | 35 | 45.87 | ½ of 22,700 @ .60 = 13.62 |
| 10/17 | do | 40 | | 111,600 @ .70 = 78.12 |
| 10/10 | Eugene Cole (mill work) | 9 | 3.15 | 35¢ per hour |
| 10/17 | do | 8 | 2.80 | 35¢ per hour |
| 10/24 | John Taylor | 40 | 26.89 | ½ of 49,400 @ .60 = 29.64 |
| 10/31 | do | 19 | | 34,500 @ .70 = 24.15 |
| 10/24 | Clifton Holmes | 40 | 26.89 | ½ of 49,400 @ .60 = 29.64 |
| 10/31 | do | 19 | | 34,500 @ .70 = 24.15 |
| 10/31 | John Taylor (mill work) | 24 | 8.40 | 35¢ per hour |
| 10/31 | Clifton Holmes (mill work) | 44 | 16.10 | 35¢ per hour |
| 10/24 | Ed Hall | 40 | 49.54 | ½ of 22,700 @ .60 = 13.62 |
| 10/31 | do | 35 | | 122,100 @ .70 = 85.47 |
| 10/24 | Eugene Cole | 40 | 49.54 | ½ of 22,700 @ .60 = 13.62 |
| 10/31 | do | 35 | | 122,100 @ .70 = 85.47 |
| 11/7 | John Taylor | 22 | 35.77 | ½ of 48,900 @ .60 = 29.34 |
| 11/14 | do | 40 | | 60,300 @ .70 = 42.21 |
| 11/7 | Clifton Holmes | 22 | 35.77 | ½ of 48,900 @ .60 = 29.34 |
| 11/14 | do | 34 | | 60,300 @ .70 = 42.21 |
| 11/7 | Eugene Cole | 40 | 47.72 | ½ of 8,300 @ .60 = 4.86 |
| 11/14 | do | 40 | | 129,400 @ .70 = 90.58 |
| 11/7 | Ed Hall | 40 | 38.83 | ½ of 8,100 @ .60 = 4.86 |
| 11/14 | do | 24 | | 129,400 @ .70 = 90.58 |
| 11/14 | Jay Houser | 21 | 8.89 | |
| 11/7 | Lorenza Poon | | 3.50 | ½ of 10,000 @ .70 = 7.00 |
| 11/14 | do | | | |
| 11/7 | Bob Noy | | 3.50 | ½ of 10,000 @ .70 = 7.00 |
| 11/14 | do | | | |
| 11/21 | John Taylor | 40 | 46.76 | 51,800 @ .60 = 31.08 |
| 11/28 | do | 36 | | 22,400 @ .70 = 15.68 |

## 1942—Continued

| Week ending | Name | Hours worked | Amount paid | Basis |
|---|---|---|---|---|
| 11/21 | Clifton Holmes | 40 | $46.76 | 51,800 @ $0.60 = $31.08 |
| 11/28 | do | 36 | | 22,400 @ .60 = 13.68 |
| 11/21 | Jay Hauser | 40 | 43.65 | 1,000 @ .60 = .60 |
| 11/28 | do | 36 | | 61,300 @ .70 = 43.05 |
| 11/21 | Eugene Cole | 40 | 43.65 | 1,000 @ .60 = .60 |
| 11/28 | do | 36 | | 61,300 @ .70 = 43.05 |
| 12/5 | John Taylor | 40 | 53.56 | 71,300 @ .60 = 42.78 |
| 12/12 | do | 35 | | 15,400 @ .70 = 10.78 |
| 12/5 | Clifton Holmes | 40 | 53.56 | 71,300 @ .60 = 42.78 |
| 12/12 | do | 35 | | 15,400 @ .70 = 10.78 |
| 12/5 | Eugene Cole | 40 | 44.25 | 3,400 @ .60 = 2.04 |
| 12/12 | do | 35 | | 50,300 @ .70 = 42.21 |
| 12/5 | Ed Hall | 40 | 44.25 | 3,400 @ .60 = 2.04 |
| 12/12 | do | 35 | | 50,300 @ .70 = 42.21 |
| 12/5 | Lorenza Poon | 8 | 3.78 | 5,400 @ .70 3.78 |
| 12/5 | Lorenza Poon (mill work) | 35 | 12.25 | 35¢ per hour |
| 12/5 | Jay Houser | 37 | 17.57 | 25,100 @ .70 = 17.57 |
| 12/12 | do | 7 | | |
| 12/5 | do | 11 | 3.85 | 35¢ per hour |
| 12/19 | John Taylor | 39 | 37.13 | 53,600 @ .60 = 32.16 |
| 12/26 | do | 12 | | 7,100 @ .70 4.97 |
| 12/19 | Clifton Holmes | 39 | 24.98 | 33,700 @ .60 20.22 |
| 12/26 | do | 12 | | 6,800 @ .70 4.76 |
| 12/19 | Jay Hauser | | 19.76 | ½ of 3,800 @ .60 = 2.28 |
| 12/26 | do | | | ½ of 53,200 @ .70 = 37.24 |
| 12/19 | Lorenza Poon | 10 | 19.76 | ½ of 3,800 @ .60 = 2.28 |
| 12/26 | do | | | ½ of 53,200 @ .70 = 37.24 |
| 12/26 | Jay Hauser (mill work) | 45 | 21.18 | 35¢ per hour |
| 12/19 | Lorenza Poon (mill work) | 12½ | 4.38 | 35¢ per hour |
| 12/26 | do | 16 | 5.60 | 35¢ per hour |
| 12/19 | Eugene Cole | 22 | 22.79 | ½ of 3,100 @ .60 = 1.86 |
| 12/26 | do | 12 | | ½ of 29,900 @ .70 = 20.93 |
| 12/19 | Ed Hall | 33 | 31.93 | ½ of 2,000 @ .60 = 1.20 |
| 12/26 | do | 12 | | ½ of 43,900 @ .70 = 30.73 |

## 1943

| Week ending | Name | Hours worked | Amount paid | Basis |
|---|---|---|---|---|
| 1/2 | John Taylor | 28 | $32.07 | 43,300 @ $0.60 = $25.98 |
| 1/9 | do | 23 | | 8,700 @ .70 = 6.09 |
| 1/2 | Clifton Holmes | 28 | 31.81 | 43,100 @ .60 = 25.86 |
| 1/9 | do | 22 | | 8,500 @ .70 = 5.95 |
| 1/2 | Eugene Cole | 33 | 34.06 | 19,900 @ .60 = 11.94 |
| 1/9 | do | 23 | | 36,900 @ .70 = 22.12 |
| 1/2 | Ed Hall | 33 | 33.99 | 19,900 @ .60 = 11.94 |
| 1/9 | do | 23 | | 31,500 @ .70 = 22.05 |
| 1/2 | Bob Noy | 19 | 10.92 | 21,000 @ .60 = 1.26 |
| 1/9 | do | | | 13,800 @ .70 = 9.66 |
| 1/2 | Bob Noy (mill work) | 4 | 1.40 | 35¢ per hour |
| 1/2 | Lorenza Poon | 22 | 10.78 | 21,000 @ .60 = 1.26 |
| 1/9 | do | | | 13,600 @ .70 = 9.52 |
| 1/2 | Lorenza Poon (mill work) | 7 | 2.45 | 35¢ per hour |
| 1/16 | John Taylor | | 51.56 | 76,600 @ .60 = 45.96 |
| 1/23 | do | | | 8,000 @ .70 = 5.60 |
| 1/16 | Clifton Holmes | 40 | 43.90 | 64,300 @ .60 = 38.58 |
| 1/23 | do | 39 | | 7,600 @ .70 = 5.32 |
| 1/16 | Ed Hall | 40 | 35.60 | 15,000 @ .60 = 9.00 |
| 1/23 | do | 39 | | 38,000 @ .70 = 26.60 |
| 1/16 | Eugene Cole | 40 | 35.97 | 14,800 @ .60 = 8.88 |
| 1/23 | do | 39 | | 38,700 @ .70 = 27.09 |
| 1/30 | John Taylor | 32 | 43.01 | 64,100 @ .60 = 38.46 |
| 2/6 | do | 26 | | 6,500 @ .70 = 4.55 |
| 1/30 | Clifton Holmes | 32 | 42.08 | 62,900 @ .60 = 37.74 |
| 2/6 | do | 30 | | 6,200 @ .70 = 4.34 |
| 1/30 | Ed Hall | 25 | 31.88 | 12,300 @ .60 = 7.38 |
| 2/6 | do | 33 | | 35,000 @ .70 = 24.50 |
| 1/30 | Eugene Cole | 25 | 32.35 | 12,500 @ .60 = 7.50 |
| 2/6 | do | 32 | | 35,500 @ .70 = 24.85 |

## 1943—Continued

| Week ending | Name | Hours worked | Amount paid | Basis |
|---|---|---|---|---|
| 2/13 | John Taylor | 30 | $35.92 | 48,200 @ $0.60=$28.92 |
| 2/20 | do | 30 | | 10,000 @ .70= 7.00 |
| 2/13 | John Taylor (mill work) | 10 | 3.50 | 35¢ per hour |
| 2/20 | do | 3 | 1.05 | 35¢ per hour |
| 2/13 | Clifton Holmes | 30 | 33.90 | 45,300 @ .60= 27.18 |
| 2/20 | do | 30 | | 9,600 @ .70= 6.72 |
| 2/13 | Clifton Holmes (mill work) | 10 | 3.50 | 35¢ per hour |
| 2/20 | do | 4 | 1.40 | 35¢ per hour |
| 2/13 | Ed Hall | 40 | 37.97 | 10,900 @ .60= 6.54 |
| 2/20 | do | 30 | | 44,900 @ .70= 31.43 |
| 2/13 | Eugene Cole | 40 | 37.97 | 10,900 @ .60= 6.54 |
| 2/20 | do | 38 | | 44,900 @ .70= 31.43 |
| 2/13 | Lorenza Poon | 8 | 6.51 | 9,300 @ .70= 6.51 |
| 2/20 | do | 44½ | 16.37 | 35¢ per hour |
| 2/27 | John Taylor | 29 | 30.85 | 35,200 @ .60= 21.12 |
| 3/6 | do | 23 | | 13,900 @ .70= 9.73 |
| 2/27 | John Taylor (mill work) | 10 | 3.50 | 35¢ per hour |
| 3/6 | do | 2 | .70 | 35¢ per hour |
| 2/27 | Clifton Holmes | 29 | 25.97 | 28,700 @ .60= 17.22 |
| 3/6 | do | 25 | | 12,500 @ .70= 8.75 |
| 2/27 | Clifton Holmes (mill work) | 10 | 3.50 | 35¢ per hour |
| 3/6 | do | 2 | .70 | 35¢ per hour |
| 2/27 | Ed Hall | 40 | 31.75 | 4,500 @ .60= 2.70 |
| 3/6 | do | 23 | | 41,500 @ .70= 29.05 |
| 2/27 | Eugene Cole | 24 | 28.88 | 4,500 @ .60= 2.70 |
| 3/6 | do | 23 | | 37,400 @ .70= 25.18 |
| 2/27 | Lorenza Poon | 7 | 3.50 | 5,000 @ .70= 3.50 |
| 3/6 | do | | | |
| 2/27 | Lorenza Poon (mill work) | 34½ | 12.08 | 35¢ per hour |
| 3/13 | John Taylor | 39 | 45.62 | 59,700 @ .60= 35.82 |
| 3/20 | do | 32 | | 14,000 @ .70= 9.80 |
| 3/13 | Clifton Holmes | 39 | 44.24 | 58,100 @ .60= 34.86 |
| 3/20 | do | 32 | | 13,400 @ .70= 9.38 |
| 3/13 | Ed Hall | 39 | 33.21 | 27,000 @ .60= 16.20 |
| 3/20 | do | 32 | | 24,300 @ .70= 17.01 |
| 3/13 | Eugene Cole | 39 | 32.91 | 27,200 @ .60= 16.32 |
| 3/20 | do | 32 | | 23,700 @ .70= 16.59 |
| 3/27 | John Taylor | 37 | 60.25 | 86,300 @ .60= 51.78 |
| 4/3 | do | 40 | | 12,100 @ .70= 8.47 |
| 3/27 | John Taylor (mill work) | 3 | 1.05 | 35¢ per hour |
| 3/27 | Clifton Holmes | 37 | 43.94 | 59,700 @ .60= 35.82 |
| 4/3 | do | 26 | | 11,600 @ .70= 8.52 |
| 3/27 | do | 3 | 1.05 | 35¢ per hour |
| 3/27 | Ed Hall | 40 | 44.03 | 9,800 @ .60= 5.88 |
| 4/3 | do | 40 | | 54,500 @ .70= 38.15 |
| 3/27 | Eugene Cole | 14 | 17.74 | 4,600 @ .60= 2.76 |
| 4/3 | do | 25 | | 21,400 @ .70= 14.98 |
| 4/3 | do | 24½ | 10.07 | 35 cents per hour |
| 3/27 | Lorenza Poon | 20 | 20.48 | 300 @ .60= .18 |
| 4/3 | do | 14 | | 29,000 @ .70= 20.30 |
| 3/27 | Lorenza Poon (mill work) | 31½ | 10.42 | 35 cents per hour |
| 4/3 | do | 33 | 12.79 | 35 cents per hour |
| 4/10 | John Taylor | 52 | 49.75 | 63,200 @ .60= 37.92 |
| 4/17 | do | 42½ | | 16,900 @ .70= 11.83 |
| 4/10 | Clifton Holmes | 52 | 42.00 | 51,100 @ .60= 30.64 |
| 4/17 | do | 42½ | | 16,200 @ .70= 11.34 |
| 4/10 | Ed Hall | 19 | 23.13 | 12,300 @ .60= 7.38 |
| 4/17 | do | 32½ | | 22,500 @ .70= 15.75 |
| 4/10 | Eugene Cole | 40 | 38.45 | 27,100 @ .60= 16.26 |
| 4/17 | do | 32½ | | 31,700 @ .70= 22.19 |
| 4/10 | Shedick Golson | 12 | | |
| 4/17 | do | 8 | | |
| 4/10 | Shedick Golson (mill work) | 36 | 12.60 | 35¢ per hour |
| 4/17 | do | 18 | 6.30 | 35¢ per hour |
| 4/24 | John Taylor | 48 | 46.37 | 61,300 @ .60= 36.78 |
| 5/1 | do | 34½ | | 13,700 @ .70= 9.59 |
| 4/24 | Clifton Holmes | 47 | 50.79 | 63,300 @ .60= 37.98 |
| 5/1 | do | 41½ | | 18,350 @ .70= 12.81 |
| 4/24 | Ed Hall | 39½ | 37.56 | 19,900 @ .60= 11.94 |
| 5/1 | do | 35 | | 36,600 @ .70= 25.62 |
| 4/24 | Eugene Cole | 43½ | 43.55 | 3,000 @ .60= 18.00 |
| 5/1 | do | 34 | | 36,500 @ .70= 25.55 |
| 5/8 | Clifton Holmes | 51 | 40.95 | 63,000 @ .60= 37.80 |
| 5/15 | do | 43½ | | 4,500 @ .70= 3.15 |

## 1943—Continued

| Week ending | Name | Hours worked | Amount paid | Basis |
|---|---|---|---|---|
| 5/8 | Ed Hall | 32 | $20.47 | 1,400 @ $0.60 = $0.84 |
| 5/15 | do | 17 | | 40,900 @ .70 = 28.63 |
| 5/8 | Eugene Cole | 44 | 27.72 | 39,600 @ .70 = 27.72 |
| 5/15 | do | 18½ | | |
| 5/15 | Eugene Cole (mill work) | 14 | 5.60 | 40¢ per hour |
| 5/22 | John Taylor | 36 | 33.92 | 39,500 @ .60 = 23.70 |
| 5/29 | do | 18 | | 14,600 @ .70 = 10.22 |
| 5/22 | John Taylor (mill work) | 17½ | 9.70 | 40¢ per hour |
| 5/29 | do | 9 | 3.60 | 40¢ per hour |
| 5/22 | Clifton Holmes | 27 | 26.05 | $28,600 @ .60 = 17.16 |
| 5/29 | do | 18 | | $12,700 @ .70 = 8.89 |
| 5/22 | Clifton Holmes (mill work) | 14 | 5.80 | 40¢ per hour |
| 5/29 | do | 9 | 3.60 | 40¢ per hour |
| 5/22 | Ed Hall | 42½ | 29.89 | 42,700 @ .70 = 29.89 |
| 5/29 | do | 33½ | | |
| 5/22 | Eugene Cole | 46½ | 26.53 | 37,900 @ .70 = 26.53 |
| 5/29 | do | 16 | | |
| 6/5 | John Taylor | 45 | 48.86 | 67,900 @ .60 = 40.74 |
| 6/12 | do | 48½ | | 11,600 @ .70 = 8.12 |
| 6/12 | John Taylor (mill work) | 4 | 2.40 | 40¢ per hour |
| 6/5 | Clifton Holmes | 26 | 32.10 | 40,900 @ .60 = 24.54 |
| 6/12 | do | 35½ | | 10,800 @ .70 = 7.56 |
| 6/5 | Ed Hall | 46 | 40.86 | 27,500 @ .60 = 16.50 |
| 6/12 | do | 48 | | 34,800 @ .70 = 24.36 |
| 6/5 | Eugene Cole | 12 | 4.97 | 700 @ .60 = .42 |
| 6/12 | do | | | 6,500 @ .70 = 4.55 |
| 6/5 | Eugene Cole (mill work) | 8 | 3.20 | 40¢ per hour |
| 6/12 | do | 34½ | 13.80 | 40¢ per hour |
| 6/19 | John Taylor | 51 | 62.14 | 96,100 @ .60 = 57.63 |
| 6/26 | do | 44½ | | 6,400 @ .70 = 4.48 |
| 6/19 | Clifton Holmes | 4 | 1.68 | 2,800 @ .60 = 1.68 |
| 6/26 | do | | | |
| 6/19 | Ed Hall | 43 | 43.78 | 44,500 @ .60 = 26.70 |
| 6/26 | do | 47 | | 24,400 @ .70 = 17.08 |
| 6/19 | Eugene Cole | 11 | 4.02 | 2,500 @ .60 = 1.50 |
| 6/26 | do | | | 3,600 @ .70 = 2.52 |
| 6/19 | Connie Nixon | 9 | 3.00 | 5,000 @ .60 = 3.00 |
| 6/26 | do | | | |
| 6/19 | Connie Nixon (mill work) | 36½ | 14.60 | 40¢ per hour |
| 6/26 | do | 43½ | 18.10 | 40¢ per hour |
| 6/19 | Claython Carter | 13 | 29.66 | 20,900 @ .60 = 12.54 |
| 6/26 | do | 51 | | 23,600 @ .70 = 16.52 |
| 6/19 | Shedick Golson | 9 | 3.12 | 5,200 @ .60 = 3.12 |
| 6/26 | do | | | |
| 6/26 | Shedick Golson (mill work) | 10 | 4.00 | 40¢ per hour |
| 7/3 | John Taylor | 42 | 74.71 | 94,300 @ .60 = 56.58 |
| 7/10 | do | 55 | | 25,900 @ .70 = 18.13 |
| 7/3 | Ed Hall | 42 | 36.02 | 29,700 @ .60 = 17.82 |
| 7/10 | do | 43 | | 26,000 @ .70 = 18.20 |
| 7/3 | Claython Carter | 42 | 26.43 | 21,300 @ .60 = 12.78 |
| 7/10 | do | 23 | | 19,500 @ .70 = 13.65 |
| 7/10 | Claython Carter (mill work) | 5 | 2.00 | 40¢ per hour |
| 7/17 | John Taylor | 49 | 59.94 | 99,900 @ .60 = 59.94 |
| 7/24 | do | 43 | | |
| 7/17 | Claython Carter | 39 | 30.81 | 4,100 @ .60 = 2.46 |
| 7/24 | do | 49 | | 40,500 @ .70 = 28.35 |
| 7/17 | Claython Carter (mill work) | 6 | 2.40 | 40¢ per hour |
| 7/17 | Ed Hall | 4 | .42 | 600 @ .70 = .42 |
| 7/24 | do | | | |
| 7/17 | Ed Hall (mill work) | 26 | 10.40 | 40¢ per hour |
| 7/17 | Robert Dabney | 44 | 17.88 | 39,000 @ .60 = 2.34 |
| 7/24 | do | | | 22,200 @ .70 = 15.54 |
| 7/3 | John Taylor | 39 | 53.19 | 82,700 @ .60 = 49.62 |
| 8/7 | do | 53 | | 5,100 @ .70 = 3.57 |
| 7/31 | Robt. Dabney | 47 | 20.30 | 29,000 @ .70 = 20.30 |
| 8/7 | do | | | |
| 7/31 | Claython Carter | 47 | 36.40 | 52,000 @ .70 = 36.40 |
| 8/7 | do | 39 | | |
| 7/31 | William Mack | 17 | 7.42 | 10,600 @ .70 = 7.42 |
| 8/7 | do | | | |
| 7/31 | Ed Hall | 39 | 15.61 | 22,300 @ .70 = 15.61 |
| 8/7 | do | | | |
| 7/31 | Ed Hall (mill work) | 32½ | 13.00 | 40¢ per hour |
| 8/14 | John Taylor | 41 | 55.19 | 88,600 @ .60 = 53.16 |
| 8/21 | do | 35 | | 2,900 @ .70 = 2.03 |
| 8/14 | John Taylor (mill work) | 2 | .80 | 40¢ per hour |

## 1943—Continued

| Week ending | Name | Hours worked | Amount paid | Basis |
|---|---|---|---|---|
| 8/14 | William Mack | 36 | $32.46 | 54,100 @ $0.60 = $32.46 |
| 8/21 | do | 39 | | |
| 8/14 | Ed Hall | 12 | 13.01 | 9,900 @ .60 = 5.94 |
| 8/21 | do | | | 10,100 @ .70½ = 7.07 |
| 8/14 | Claython Carter | 12 | 29.07 | 18,000 @ .60 = 10.80 |
| 8/21 | do | 44 | | 26,100 @ .70 = 18.27 |
| 8/28 | John Taylor | 48½ | 63.62 | 78,200 @ .70 = 54.74 |
| 9/4 | do | 53 | | 11,100 @ .80 = 8.88 |
| 8/28 | Claython Carter | 44 | 47.61 | 3,200 @ .70 = 2.24 |
| 9/4 | do | 48 | | 53,900 @ .80 = 45.52 |
| 8/28 | Wm. Mack | 30 | 31.71 | 45,300 @ .70 = 31.71 |
| 9/4 | do | 27 | | |
| 8/28 | Clifton Holmes | 25 | 13.63 | 7,700 @ .70 = 5.39 |
| 9/4 | do | | | 10,300 @ .80 = 8.24 |
| 9/4 | Clifton Holmes (mill work) | 25½ | 11.48 | 45¢ per hour |
| 9/11 | John Taylor | 46 | 41.98 | 42,600 @ .70 = 29.82 |
| 9/18 | do | 40 | | |
| 9/18 | John Taylor (mill work) | 8½ | 3.83 | 45¢ per hour |
| 9/11 | Clifton Holmes | 31 | 23.89 | 19,500 @ .70 = 13.65 |
| 9/18 | do | 20½ | | 12,800 @ .80 = 10.24 |
| 9/18 | Clifton Holmes (mill work) | 18½ | 8.33 | 45¢ per hour |
| 9/11 | Claython Carter | 8 | 20.24 | 25,300 @ .80 = 20.24 |
| 9/18 | do | 9 | | |
| 9/11 | Claython Carter (mill work) | 27 | 12.15 | 45¢ per hour |
| 9/18 | do | 33½ | 15.63 | 45¢ per hour |
| 9/11 | William Mack | 13 | 6.58 | 9,400 @ .70 6.58 |
| 9/18 | do | 1 | | |
| 9/11 | Boots Walter | 10 | 4.93 | 3,500 @ .70 = 2.45 |
| 9/18 | do | | | 3,100 @ .80 = 2.48 |
| 9/18 | do | 51 | 28.90 | 45¢ per hour |

PLAINTIFF'S EXHIBIT NO. 3

YOUNGERMAN-REYNOLDS HARDWOOD CO., INC.,
MONTGOMERY, ALA.,

*December 11, 1941.*

WAGE AND HOUR BOARD,
*Birmingham, Alabama.*

GENTLEMEN:—

Please mail us your latest ruling covering piece time workers as termed under the Wage and Hour Law.

We have reference to men who stack lumber, and who receive payment by the thousand feet.

Yours very truly,

JOE S. REESE, JR.,
*Office Manager.*

JSR/ws.

PLAINTIFF'S EXHIBIT No. 3

DECEMBER *16, 1941.*

1908 Comer Building, Birmingham, Alabama.

1-381

*Youngerman-Reynolds Hardwood Company, Inc.,*
*Montgomery, Alabama.*

Attention: Mr. Joe S. Reese, Jr., Office Manager

GENTLEMEN:

Receipt is acknowledged of your letter of December 11th requesting a ruling covering piece workers under the provisions of the Fair Labor Standards Act.

I am enclosing copy of Interpretative Bulletin No. 4, and would like to call your attention to paragraph 8 which, I think, will answer your question.

I am also enclosing copy of Timber Products Industry Wage Order for your information.

Yours very truly,

ROBERT L. TILL,
*Supervising Inspector.*

Enclosures (2).
CC: Administrator.
RLT/mcr.

*Motion*

Comes now the plaintiff and shows unto the Court that on January 22, 1944, it filed herein his notice of entry of appeal; that under Rule 73 (g) of the Federal Rules of Civil Procedure the record on appeal must be filed and the action docketed in the Circuit Court of Appeals within 40 days from the date of the notice of appeal, or before February 27, 1944; that the parties, in order to eliminate unnecessary material from the record on appeal, have been engaged for several days in the preparation of a compilation of the wages and hours of lumber stackers, the sole class of employees involved in the litigation, which said compilation, designated Plaintiff's Exhibit No. 1, will be substituted in the record on appeal in lieu of Plaintiff's Exhibits Nos. 1 and 2, pursuant to the order of this Court entered on February 25, 1944; that the preparation of said compilation was not completed until February 23, 1944; and that, by reason of this fact, the clerk will not have sufficient time within which to assemble the record and lodge it with the Appellate Court by February 27, 1944;

Wherefore, plaintiff moves the Court to enter an order under Rule 73 (g) of the Federal Rules of Civil Procedure extending

for 15 days, and until March 13, 1944, the time for filing the record on appeal and docketing the action in the Circuit Court of Appeals.

Dated: February 24, 1944

DOUGLAS B. MAGGS,
*Solicitor,*

ARCHIBALD COX,
*Associate Solicitor,*

AMZY B. STEED,
*Acting Regional Attorney,*

JACK H. MCGUIRE,
*Associate Attorney,*
*United States Department of Labor,*
*Attorneys for Plaintiff.*

ORDER

It appearing to the Court from plaintiff's foregoing motion that the parties, in order to eliminate unnecessary material from the record on appeal, have been engaged in the preparation of a compilation of the wages and hours of lumber stackers, the sole class of employees involved in this litigation, which said compilation will be substituted in the record on appeal in lieu of Plaintiff's Exhibits Nos. 1 and 2; that the preparation of this compilation was not completed until February 23, 1944; that, by reason of this fact, the clerk will not have sufficient time within which to assemble the record and lodge it with the Appellate Court before the expiration of 40 days from the date of the notice of appeal, or before February 27, 1944; and that the plaintiff has moved the Court to enter an order under Rule 73 (g) of the Federal Rules of Civil Procedure extending for 15 days, and until March 13, 1944, the time for filing the record on appeal and docketing the action in the Circuit Court of Appeals, upon consideration whereof,

It is hereby ordered and adjudged that the time for filing the record on appeal and docketing the action in the Circuit Court of Appeals be, and it hereby is, extended for 15 days, and until March 13, 1944.

Done and ordered at Montgomery, Alabama, this 25th day of February 1944.

C. B. KENNAMER,
*United States District Judge.*

Filed February 25, 1944. O. D. Street, Jr., Clerk. By Annie Schoolar, Deputy Clerk.

*Certificate*

UNITED STATES OF AMERICA,
*Middle District of Alabama.*

I, O. D. Street, Jr., Clerk of the United States District Court, Middle District of Alabama, do hereby certify that the foregoing pages numbered one to three hundred sixty-two, both inclusive, contain a full, complete, true and perfect transcript of the proceedings on appeal in the case of L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, Plaintiff, versus Youngerman-Reynolds Hardwood Co., Inc., Defendant, Civil Action No. 238–M of the Docket of said Court.

Witness my hand and the seal of said Court in the City of Montgomery, Alabama, on this the 8th day of March 1944.

[SEAL] O. D. STREET, Jr.,
*Clerk, United States District Court,*
*Middle District of Alabama.*

U. S. GOVERNMENT PRINTING OFFICE: 1944

That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

*Argument and submission*

Extract from the Minutes of October 16th, 1944

No. 10974

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR

*vs.*

YOUNGERMAN-REYNOLDS HARDWOOD CO., INC.

On this day this cause was called, and, after argument by Archibald Cox, Esq., Associate Solicitor, Wage & Hour Division, for appellant, and Fred S. Ball, Esq., for appellee, was submitted to the Court.

*Opinion of the court*

Filed November 10, 1944

In the United States Circuit Court of Appeals
for the Fifth Circuit

No. 10974

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, APPELLANT

*vs.*

YOUNGERMAN-REYNOLDS HARDWOOD CO., INC., APPELLEE

Appeal from the District Court of the United States for the Middle District of Alabama

(November 10, 1944)

Before SIBLEY, MCCORD, and LEE, Circuit Judges

McCORD, Circuit Judge: The Administrator of the Wage and Hour Division, U. S. Department of Labor, sought under Section 17 of the Fair Labor Standards Act to restrain by injunction the Youngerman-Reynolds Hardwood Company, Inc., from alleged violations of the overtime and record-keeping provisions of the

Act. Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060; U. S. C. Title 29, Sec. 201 et seq.

Upon a hearing the court below declined to issue an injunction and dismissed the complaint. The Administrator appeals.

The facts are not in dispute. Youngerman-Reynolds Co., Inc., a Tennessee corporation, was engaged at Samson, Alabama, in the manufacture of lumber for shipment in interstate commerce. There is no complaint as to the wages and hours of all employees of the lumber manufacturing plant, save the laborers known as "stackers." In the manufacture of the lumber and after it came from the mill it was moved out onto the yard by laborers working by the hour and there turned over to stackers whose duty it was to stack and rick the lumber as they were directed. These stackers were paid by the piece, 70¢ per thousand feet where the lumber was ricked, and 80¢ per thousand where it was stacked. They had no certain hours in which to work, and commenced and quit as they desired; they generally worked in pairs and were not required by the defendant to keep hours. They worked overtime at certain periods, but overtime work did not occur often; they would work for weeks and even months when there was no overtime work. The custom in the lumber industry where these laborers worked had always been to pay stackers on a piece-rate basis. Stackers are common laborers and they nearly always make double the wages of other common laborers working on an hourly basis. Some of the crews would go to work very early in the morning when it was cool, and then lay off in the heat of the day and return to work in the cool of the afternoon; they knocked off from work when it would rain, and generally worked when they pleased; the nature of their work was such that they worked practically without supervision. They preferred to work on a piece-rate basis, and objected to working by the hour. In the year 1940 an inspector informed the defendant that his piece-rate pay was all right; later, in 1941, a second inspection was made, and again the defendant was told that his piece-rate basis was satisfactory; a third inspection in the fall of 1942 was made and then, for the first time, the defendant was told that his piece-rate basis of paying the stackers without extra pay for overtime hours was a violation of the law. Thereupon, the defendant advanced wages to the stackers and held the pay roll in suspense until the defendant could find out what its duties were; and the evidence is without dispute that this was done in good faith and with a desire to obey the law. In all instances where overtime was worked, the amount paid exceeded the statutory minimum for time and overtime.

The complaint as filed charged that the defendant had violated the provisions of the Act in that it had shipped lumber pro-

duced by certain suppliers in violation of the Act, but the plaintiff in open court abandoned this claim. Furthermore, on the trial the issue was confined by the plaintiff to employees only engaged in stacking lumber. It was not charged that defendant failed to keep adequate records with reference to its employees.

On the day before the trial a new contract had been entered into between the defendant and the stackers, which provided for time and overtime, with a guarantee of additional pay based on the amount of lumber stacked, and the defendant ceased to employ stackers on the basis complained of. Moreover, it was manifest that the defendant had no intention of returning to the method of payment in dispute. We, therefore, agree with the trial court, that there was no necessity for an injunction to prohibit future violations. Hecht v. Bowles, Price Administrator, 321 U. S. 321; Fleming v. Hoerman, d. b. a. Lyndon Broom Co., 6 Labor Cases Sec. 61283; Fleming v. National Bank of Commerce of Charleston, 41 Fed. Supp. 833; Fleming v. W. E. Lipshutz, dba Monarch Co., 6 Labor Cases Sec. 61490.

Affirmed.

*Judgment*

Extract from the Minutes of November 10, 1944

No. 10974

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR,

*vs.*

YOUNGERMAN-REYNOLDS HARDWOOD CO., INC.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Middle District of Alabama, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

*Petition for rehearing*

Filed November 29, 1944

In the United States Circuit Court of Appeals for the Fifth Circuit

No. 10974

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, APPELLANT

*v.*

YOUNGERMAN-REYNOLDS HARDWOOD COMPANY, INC., APPELLEE

Appeal From the District Court of the United States for the Middle District of Alabama

PETITION FOR REHEARING

Appellant respectfully petitions the court for a rehearing of its decision in the above case handed down on November 10, 1944, on the following grounds:

1. Since the argument in the case, and apparently since the opinion of the Court was prepared, the Supreme Court has handed down its opinion in Walling v. Helmerich & Payne, Inc., No. 27, this Term, which is controlling in the instant case.

The contract entered into between the defendant and its stackers the day before the trial (R. 110–111) recites that the "regular rate" of pay should be 35 cents an hour with time and one-half for overtime. The contract also promised the stackers, however, that notwithstanding this provision for a regular rate of 35 cents an hour they would actually be paid 70 cents per thousand feet for all lumber ricked and 80 cents per thousand for lumber stacked. The record in the case established beyond doubt that at these piece rates the stackers would regularly receive between 55 and 60 cents an hour, more than 30 cents in excess of the rate described in the contract as the "regular rate" of pay. This was shown first, by the admission of defendant's counsel at the opening of the trial (R. 15); second, by the figures selected by defendant for the six representative weeks in 1942 (R. 106–107); and third, by analysis of the pay roll for the four months just previous to the trial which showed that at piece rates fifteen per cent lower than those due under the new contract the stackers were regularly earning 51 cents an hour (R. 119–121). The question

presented therefore was whether payment of time and a half the fictitious 35-cent rate which the contract described as the "regular rate," would comply with Section 7 because the parties were free to fix the "regular rate" by contract; or whether defendant was obliged to pay time and a half the piece rates which admittedly were the actual rates of pay.

In Walling v. Belo Corp., 316 U. S. 624, the Supreme Court stated, "It is agreed that as a matter of law employer and employee may establish the 'regular rate' by contract"; and the Court then held that the Belo contract was valid because it "specifies a basic hourly rate of pay and not less than time and a half that rate for every hour of overtime work" (316 U. S. 624, 631, 634). At the time of this Court's decision in the instant case, the quoted language could fairly be interpreted to require this Court to approve the stackers' contracts even though the regular rate stipulated in the contracts was artificial and not actually the stackers' true rate of pay for nonovertime hours. Evidently this Court so understood the Belo holding for it held that payment under the stackers' contracts would comply with the Act (Printed Opinion, p. 3).

Since the Court's decision was prepared, however, the situation has changed. The decision of the Supreme Court in Walling v. Helmerich & Payne makes it clear that the right of the parties to fix the "regular rate" by contract does not extend to fixing as the regular rate for the purposes of Section 7 a rate which was not intended to be, and was never, the *actual* regular rate of pay. The Court held—

"While the words 'regular rate' are not defined in the Act, they obviously mean the hourly *rate actually paid for the normal, nonovertime workweek.*

* * * * * *

"But *respondent's plan made no effort to base the regular rate upon the wages actually received* or upon the hours actually and regularly spent each week in working.

* * * * * *

"*It is no answer that the artificial regular rate was a product of contract or that it was in excess of the statutory minimum.* The Act clearly contemplates the setting of the regular rate in a bona fide manner through wage negotiations between employer and employee, provided that the statutory minimum is respected. But, *this freedom of contract does not include the right to compute the regular rate in a wholly unrealistic and artificial manner so as to negate the statutory purposes.* Even when wages exceed the minimum prescribed by Congress, the parties to the contract must respect the statutory policy of requiring the employer to pay one

and one-half times the regular hourly rate for all hours actually worked in excess of 40. Any other conclusion in this case would exalt ingenuity over reality and would open the door to insidious disregard of the rights protected by the Act" [Italics supplied.]

That decision would seem to be controlling in the instant case. The "rate actually paid for the normal nonovertime workweek" was the piece rate of 70 cents for ricking and 80 cents for stacking. In terms of an hourly rate, the "rate actually paid for the normal nonovertime workweek" was not 35 cents an hour but the result obtained by dividing the stackers' earnings at the piece rates by the number of hours worked. Defendant's contracts made no effort to base the regular rate on the wages actually received but fixed it at an arbitrary rate almost 50 percent lower. Here, as in the Helmerich & Payne case, it is no answer that this artificial rate was a product of contract. As this Court held in the Belo case, the Fair Labor Standards Act does not deprive an employer and its employees from fixing by contract the rates of compensation which the employees shall actually receive; but "this freedom of contract does not include the right to compute the regular rate," for the purposes of Section 7 "in a wholly unrealistic and artificial manner so as to negate the statutory purposes." That is all that the defendant did here. It has never denied that the hourly rate of 35 cents an hour was computed, without regard to the stackers' true compensation, for the sole purpose of enabling the defendant to avoid paying for all hours actually worked in excess of 40 at one and one-half times the stackers' actual, regular rate of pay.

2. We do not believe that the decision handed down on November 10 in the instant case constitutes a holding that the new contract entered into between defendant and its stackers the day before trial made proper a dismissal of the complaint regardless of whether payment under the new contract would comply with Section 7. When an employer abandons practices alleged to violate the Act and commences to comply with its provisions, without the intention of returning to its former practices, then an equity court may deny injunctive relief. But a court has no discretion to deny an injunction simply because the defendant changes from one unlawful practice to another which is equally unlawful. The right of the Administrator is to an injunction prohibiting threatened future violations of the Act. It makes no difference whether the threatened violations will result from practices originally complained of or from new practices adopted the day before trial. Any such conclusion would result in continued noncompliance until the ingenuity of a defendant and his counsel was exhausted. Consequently the supervening decision in Walling v. Heln

Payne, Inc., showing the new contract to be invalid, requires that a rehearing be granted in the instant case.

Respectfully submitted.

DOUGLAS B. MACGOS,
*Solicitor*,
ARCHIBALD COX,
*Associate Solicitor*,
BESSIE MARGOLIN,
*Assistant Solicitor*,
AMZY B. STEED,
*Regional Attorney*,
*United States Department of Labor.*

NOVEMBER 1944.

*Answer of appellee to petition for rehearing*

Filed December 11, 1944

In the United States Circuit Court of Appeals for the Fifth Circuit

No. 10974

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, APPELLANT

*vs.*

YOUNGERMAN-REYNOLDS HARDWOOD COMPANY, INC., APPELLEE

Appeal from the District Court of the United States for the Middle District of Alabama

Brief of appellee in opposition to petition by appellant for rehearing. Fred S. Ball, Jr., Attorney.

In Rule 29 of this court it is provided that a petition for rehearing must state the grounds "without argument." In support of its petition for rehearing appellant has presented a four page argument in the face of this rule. Appellant having insisted upon argument of its petition, appellee asks to be heard in opposition.

Appellant says that Walling vs. Helmerich & Payne, Inc. (89 L. ed. 1) decided (Nov. 6, 1944) a few days before the decision here (Nov. 10, 1944) is controlling in this case. To be controlling the case cited would necessarily have to be similar in its facts. There is no such similarity.

In the Helmerich case the employer was paying $7.00 for an eight hour shift or tour (or 87½¢ per hour) prior to the Act. After the Act and under a new contract the pay was to be 70¢ for the first four hours of each eight hour shift or tour as the "regular rate" and one and one half times that amount or $1.05 per hour for the other four hours, characterized as "overtime." Thus each eight hour shift would involve both "regular pay" and "overtime pay." No room for application was given to the provision of the Act for overtime pay after forty hours. This is called the "split day" plan.

In the instant case the employment contract provides for an agreed basic or regular rate of pay 35¢ (the minimum rate fixed by the Administrator for the lumber industry on November 3, 1941, R. 14) for the first forty hours each week and "not less than" one and one half times such basic or regular rate for overtime and presumably as a work incentive it provided for a guaranty of a sum for regular and overtime work arrived at by multiplying the number of board feet stacked by an agreed amount per thousand feet. But regardless of the amount of lumber stacked the employee was obligated to pay on an hourly basis for time and overtime. The agreement for an additional or extra pay based on the amount stacked would apply only if the amount figured on the price rate basis should exceed the amount figured on the hourly basis.

The Helmerich contract disregards the overtime provision of the Act while the contract in the case at bar expressly recognizes and follows it.

There is, therefore, no similarity between the "split day" plan, an hourly basis plan which disregards the provision in the Act for overtime after forty hours and the contract in the case at bar where the hourly rate is fixed by agreement which provides for overtime pay for overtime hours worked and an additional amount if the lumber stacked figured on a piece rate basis should exceed the amount figured on an hourly basis.

The vice in the "split day" plan is simply that it ignores the overtime provision of the Act. The contracts in the instant case recognize and comply with the overtime provision of the Act.

The case cited is not analagous for the further reason that it involves no guaranty as in the case at bar. The case cited does not overrule the Belo case on which contracts are based but distinguishes it by showing that the Belo case involved a different question (headnote 6) namely, whether the regular rate should be computed from the guaranteed weekly wage or whether it should be the regular rate agreed on in the contract.

Furthermore, the split day plan is condemned by the court as involving "ingenious mathematical manipulations" and as being

"unrealistic and artificial" and as "fictitious." On the contrary in the case at bar counsel for appellant have admitted that the contracts in the case at bar were "made in good faith." (Brief page 18.)

The Supreme Court in the Belo case held that:

"But it is agreed that as a matter of law the employer and employee may establish the 'regular rate,' by contract."

Nor does the purpose of paying the same lawful wages as before the Act have any bearing. The Supreme Court in the Belo case having held that:

"It is no doubt true, as petitioner contends, that the purpose of respondent's arrangement with its employees was to permit as far as possible the payment of the same total weekly wage after the Act as before. But nothing in the Act bars an employer from contracting with his employees to pay them the same wages that they received previously, so long as the new rate equals or exceeds the minimum required by the Act."

The Belo case in a sense reaffirmed by reference in the Helmerich case is the law of the case at bar and is controlling rather than the Helmerich case which deals with an entirely different system of pay.

A comparison of the brief for the Administrator on rehearing here and the argument of counsel for the Administrator in the Belo case as condensed in the report of the case shows such similarity as to indicate that what appellant is really saying is not that the Helmerich case controls this case but that this court should reverse itself and decline to follow its own ruling as affirmed by the Supreme Court in the Belo case.

Respectfully submitted.

FRED S. BALL, JR., *Attorney.*

DECEMBER 1944.

*Order denying rehearing*

Extract from the Minutes of December 26th, 1944

No. 10974

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR

*vs.*

YOUNGERMAN-REYNOLDS HARDWOOD CO., INC.

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

*Clerk's certificate*

United States of America

United States Circuit Court of Appeals, Fifth Circuit

I, Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 125 to 139 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 10374, wherein L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, is appellant, and Youngerman-Reynolds Hardwood Co., Inc., is appellee, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 124 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said United States Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 1st day of February, A. D. 1945.

OAKLEY F. DODD,
*Clerk of the United States Circuit Court of Appeals, Fifth Circuit.*

Supreme Court of the United States

*Order allowing certiorari*

Filed April 2, 1945

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE

FILE COPY

Office - Supreme Court, U. S.
FILED
FEB 17 1945
CHARLES ELMORE CROPLEY
CLERK

No. 955

# In the Supreme Court of the United States

OCTOBER TERM, 1944

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

*v.*

YOUNGERMAN-REYNOLDS HARDWOOD COMPANY, INC.

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT**

# INDEX


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 2 |
| Question presented | 2 |
| Statute involved | 2 |
| Statement | 3 |
| Reasons for granting the writ | 6 |
| Conclusion | 12 |


## CITATIONS


Cases:

*Overnight Motor Co.* v. *Missel*, 316 U. S. 572 ..... 7, 8

*United States* v. *Rosenwasser*, No. 106, this Term ..... 7, 8, 9

*Walling* v. *Belo Corp.*, 316 U. S. 624 ..... 7, 10

*Walling* v. *Harnischfeger Corporation*, petition for certiorari pending, No. 956 ..... 7, 12

*Walling* v. *Helmerich & Payne, Inc.*, No. 27, this Term ..... 6, 7, 8, 9, 10, 11, 12

Statute:

Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U. S. C. sec. 201):

Sec. 7 (a) (3) ..... 2




631364—45

# In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 955

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

*v.*

YOUNGERMAN-REYNOLDS HARDWOOD COMPANY, INC.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Fifth Circuit entered in the above case on November 10, 1944.

### OPINIONS BELOW

The findings of fact, conclusions of law and opinion of the District Court (R. 94–97) are reported at 6 Wage Hour Rept. 1117. The opinion of the Circuit Court of Appeals (R. 125–127) is reported at 145 F. (2d) 349.

## JURISDICTION

The judgment of the Circuit Court of Appeals was entered November 10, 1944 (R. 127). A petition for rehearing was denied December 26, 1944 (R. 136). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

## QUESTION PRESENTED

Whether an employer who is in fact paying his employees piece rates yielding earnings of about 59 cents an hour[1] is excused from paying additional compensation for overtime calculated upon these earnings, by a contract which recites that 35 cents an hour is the "regular rate of pay" and "guarantees" earnings at the piece rates for "regular time and such overtime as the employee may work."

## STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U. S. C., sec. 201) are as follows:

> SEC. 7 (a). No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—
>
> * * * * * *

[1] The average hourly piece work earnings which are referred to in this petition have been calculated from the actual earnings of respondent's employees, which are shown in Plaintiff's Exhibit No. 1 (R. 115–121).

"(3) For a workweek longer than forty hours after the expiration of the second year from * * * [the effective] date [of this section],"

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

## STATEMENT

Respondent, a Tennessee corporation, is engaged at Samson, Alabama, in manufacturing lumber for shipment in interstate commerce (R. 94, fdgs. 1–2). In the production of the lumber it employs a number of "stackers" who are engaged in the production of goods for interstate commerce within the meaning of the Fair Labor Standards Act (R. 11–13).

Before the Act became effective and during most of the period thereafter, respondent employed and paid its stackers at agreed piece rates per thousand board feet. Each week it paid the same piece rates during overtime hours as during non-overtime hours of work, without provision for overtime at one and one-half times the regular rate of pay as required by Section 7 of the Act (R. 95–96, fdgs. 6–7, 9).

During 1942 more than one-third of the man-weeks worked involved overtime (R. 95, fdg. 7). In the fall of that year an inspector from the Wage and Hour Division notified respondent that

its method of employing the stackers violated the overtime requirements of Section 7 (*ibid.*). Respondent, however, did not alter its method of payment but, even after this action was commenced,[2] continued to employ the stackers during overtime hours when there was work to be done, without compensating them at one and one-half times their regular rate of pay. Between April 1, 1943, and the date of the trial, the stackers worked a total of 134 man-weeks. During 34 of those weeks they worked overtime (R. 119–121; cf. R. 96, fdg. 9), again without added compensation for overtime.

On the day before the trial respondent entered into elaborate contracts with its stackers, signed with a mark by each of the illiterate employees (R. 108–109), which provided that—

> The basic or regular rate of pay is 35¢ per hour for the first forty hours each week and for time over forty hours each week the pay shall not be less than one and one-half times such basic or regular rate above mentioned with a guaranty that the employee shall receive weekly for regular time and for such overtime as the employee may work a sum arrived at as follows:
>
> The amount of stacking done by said employee shall be figured on the basis of 80¢ per thousand board feet of lumber for flat stacking and 70¢ per thousand board feet of lumber ricked.

[2] The complaint in this action was filed on March 17, 1943 (R. 1).

When these agreements were signed, the explanation given to the stackers was that they would continue to be paid piece rates per thousand board feet just as before, but at the higher rates specified in the contracts. There was no evidence that the stackers understood that the agreement was intended to fix the hourly rate for the purposes of the Fair Labor Standards Act at 35 cents an hour rather than at the average hourly earnings of about 59 cents yielded by the new piece work rates. (R. 63–65.)

From April 1, 1943 until the trial the stackers were paid piece rates of 60 and 70 cents per thousand. During this period they earned at those rates an average of 51 cents an hour (see n. 1, *supra*). At the new rates of 70 and 80 cents per thousand the stackers would earn an average of about 59 cents an hour for all hours, well above the 52½-cent overtime rate which would come into operation during weekly overtime hours if the "regular rate" of 35 cents were to be given effect. Hence the new contract, if effective, would enable respondent to pay the specified piece rates uniformly during all hours worked, without higher rates for overtime employment.

The District Court ordered that the complaint be dismissed and the defendant be freed of costs (R. 97). On appeal, the Circuit Court of Appeals affirmed the judgment, holding (R. 127)—

> On the day before the trial a new contract had been entered into between the defendant and the stackers which provided for time and overtime, with a guarantee of additional pay based on the amount of lumber stacked, and the defendant had no intention of returning to the method of payment in dispute. We, therefore, agree with the trial court, that there was no necessity for an injunction to prohibit future violations.

Because the decision of the Circuit Court of Appeals was handed down on November 10, 1944, only four days after the decision of this Court in *Walling* v. *Helmerich & Payne, Inc.*, No. 27, this Term, the Administrator filed a petition for rehearing in which he renewed his argument that payment under the contracts signed the day before the trial would not comply with the Act and pointed out that his contention was squarely supported by the *Helmerich & Payne* decision. On December 26, 1944, the Circuit Court of Appeals denied the petition for rehearing without opinion (R. 136).

## REASONS FOR GRANTING THE WRIT

By holding that respondent's employment contracts, executed the day before trial, controlled the overtime compensation of the employees involved, the Circuit Court of Appeals permitted a clear evasion of the Act to stand and failed to give effect to the controlling decision of this

Court in *Walling* v. *Helmerich & Payne Inc.*, No. 27, this Term, decided November 6, 1944. This refusal to apply the overtime provisions of the Act to piece workers raises a serious administrative problem; for this case, coupled with *Walling* v. *Harnischfeger Corporation* (C. C. A. 7), in which certiorari is being sought by the Government in a petition filed at the same time as this petition, reflects continued uncertainty in the Federal courts over the proper application of the decisions of this Court in *Walling* v. *Belo Corp.*, 316 U. S. 624; *Overnight Motor Co.* v. *Missel*, 316 U. S. 572; and *Walling* v. *Helmerich & Payne, Inc.*, *supra*. See the Petition for a Writ of Certiorari in the *Harnischfeger case*, pp. 10–17.

The purpose and effect of respondent's contracts were to circumvent the overtime requirements of the Act. Until the day before trial respondent had been employing the stackers at piece rates of 60 and 70 cents per thousand board feet for more than 40 hours a week. This was a plain violation of Section 7. *United States* v. *Rosenwasser*, No. 106, this Term. It was immaterial that these rates yielded 51 cents an hour, or enough each week to cover the 35-cent minimum wage rate then applicable plus one and one-half times the minimum for overtime. "The Act was designed to require payment for overtime at time and a half the regular pay, where that pay is above the minimum, as well

as where the regular pay is at the minimum" (*Overnight Motor Co.* v. *Missel*, 316 U. S. 572, 578). Respondent was required by the Act to convert the piece rate earnings by computation to hourly rates and to pay at least one and one-half times those rates for overtime employment. *United States* v. *Rosenwasser, supra.*

The contracts executed the day before trial did not alter the character of the arrangement, but were intended to preserve it. Respondent "guaranteed" that it would pay the specified piece rates, yielding about 59 cents an hour, uniformly for all hours of work and provided that these payments should be deemed to include compensation for overtime at not less than one and one-half times the rate of 35 cents an hour, which was labelled the "regular rate of pay." Obviously the 35-cent rate was not the stackers' normal, non-overtime compensation, which would be determined by the piece rates actually paid, but was simply an artificial, fictitious rate approximately 40 per cent lower than the actual normal rate for the non-overtime hours. This so-called "regular rate" was not used for any other purpose than to avoid the payment of actual overtime compensation.

In *Walling* v. *Helmerich & Payne, Inc., supra,* this Court held that the term "regular rate" does not refer to any artificial rate that may be designated, but must be based "upon the wages actually received" during "the hours actually and regu-

larly spent each week in working" (slip opinion, p. 4). The opinion of the Court states (slip opinion, p. 3):

> While the words "regular rate" are not defined in the Act, they obviously mean the hourly rate actually paid for the normal, non-overtime workweek.

This principle was reaffirmed in *United States* v. *Rosenwasser, supra* (slip opinion, p. 3). In the instant case the "rate actually paid for the normal, non-overtime workweek" under the new contracts must be determined, under the formula approved in the *Rosenwasser* case, by dividing each stacker's piece-rate earnings in a given week by the number of hours worked. This was not done and was not proposed to be done. No extra compensation whatever for overtime was paid or proposed to be paid. The arrangement in the new contracts, like that previously prevailing, was in plain violation of Section 7 as construed in the *Helmerich & Payne* and *Rosenwasser* decisions.

The Circuit Court of Appeals sustained the new arrangement as one "which provided for time and overtime, with a guarantee of additional pay based on the amount of lumber stacked" (R. 127). Hence it regarded the contract rate of 35 cents an hour as the "regular rate" for overtime purposes. The invalidity of attaching weight to such a contract provision appears from the opinion in *Walling* v. *Helmerich & Payne, Inc., supra* (slip opinion, pp. 4–5):

> It is no answer that the artificial regular rate was a product of contract or that it was in excess of the statutory minimum. The Act clearly contemplates the setting of the regular rate in a bona fide manner through wage negotiations between employer and employee, provided that the statutory minimum is respected. But this freedom of contract does not include the right to compute the regular rate in a wholly unrealistic and artificial manner so as to negate the statutory purposes. Even when wages exceed the minimum prescribed by Congress, the parties to the contract must respect the statutory policy of requiring the employer to pay one and one-half times the regular hourly rate for all hours actually worked in excess of 40. Any other conclusion in this case would exalt ingenuity over reality and would open the door to insidious disregard of the rights protected by the Act.

The Fair Labor Standards Act, of course, as this Court held in *Walling* v. *Belo Corp.*, 316 U. S. 624, does not deprive employers and employees of the right to fix by contract the rates of compensation which the employees shall actually receive for their normal, non-overtime hours; but "this freedom of contract does not include the right to compute the regular rate" for the purposes of Section 7 "in a wholly unrealistic and artificial manner so as to negate the statutory purposes" (*Walling* v. *Helmerich*

*& Payne, Inc.*, slip opinion, p. 4). It is in the latter manner that the rate of 35 cents an hour was fixed in the instant case. The rate which the employer and employees were free to fix by contract was the actual rate of compensation. They fixed such rates at 70 and 80 cents per thousand board feet of lumber stacked. Once these rates had been fixed, the respondent was bound to pay for overtime employment at not less than one and one-half times these rates after their translation to an hourly basis. No contract can be permitted to set this obligation aside.

The decision of the Circuit Court of Appeals, unless reversed will permit employers of piece rate workers, by contract, to set at naught the overtime requirements of the Act, through the use of fictitious "regular rates" of pay. Equally with the arrangement which was declared illegal in *Walling* v. *Helmerich & Payne, supra,* and in a substantially similar manner except that piece workers are involved, such a device entirely frustrates the purpose of Section 7. The provision of respondent's contracts that the statutory minimum shall be the "regular rate" and that not less than one and one-half times this rate will be paid for overtime permits payment of the same piece-rate compensation during overtime hours as during the regular workweek. Thus the employer avoids the financial pressure to spread employment and the employee fails to receive the added compensation for overtime which Sec-

tion 7 was designed to achieve. See *Walling* v. *Helmerich & Payne,* slip opinion, p. 3.

The judgment in this case cannot be regarded as an isolated decision which the course of subsequent decisions will correct. In *Walling* v. *Harnischfeger Corporation,* the Circuit Court of Appeals for the Seventh Circuit rendered a similar decision sustaining a collective agreement which, for purposes of Section 7, fixed a "regular rate" of pay of pieceworkers approximately 20 per cent lower than the employees' actual rate of compensation under a so-called incentive plan. As has been stated (*supra,* p. 7), a petition for certiorari to review that decision, which explores the problem involved somewhat more fully, is being filed concurrently with this petition.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

CHARLES FAHY,
*Solicitor General.*

DOUGLAS B. MACGS,
*Solicitor of Labor.*

FEBRUARY 1945.

U. S. GOVERNMENT PRINTING OFFICE: 1945

FILE COPY

Office - Supreme Court, U. S.
FILED
APR 28 1945
CHARLES ELMORE CROPLEY
CLERK

No. 955

# In the Supreme Court of the United States

OCTOBER TERM, 1944

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

*v.*

YOUNGERMAN-REYNOLDS HARDWOOD COMPANY, INC.

*ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR PETITIONER

# INDEX


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 1 |
| Question presented | 2 |
| Statute involved | 2 |
| Statement | 3 |
| Specification of errors | 6 |
| Argument: | |
| I. Payment according to the stackers' contracts of employment would violate Section 7 in weeks in which overtime was worked | 7 |
| II. The basis for the lower court's conclusion that an injunction is unnecessary, namely that the new contracts of employment comply with the Act, disappears if these contracts are illegal | 23 |
| Conclusion | 25 |


## CITATIONS


| | |
|---|---|
| Cases: | |
| *Carleton Screw Products Co.* v. *Fleming*, 126 F. 2d 537 | 14 |
| *Overnight Motor Co.* v. *Missel*, 316 U. S. 572 | 7, 15, 18, 22 |
| *Scott* v. *Atlas Press Co.*, 49 F. Supp. 260 | 14 |
| *Tennessee Coal Co.* v. *Muscoda Local*, 321 U. S. 590 | 17 |
| *United States* v. *Rosenwasser*, 323 U. S. 360 | 7, 8, 9, 10, 12 |
| *Walling* v. *Belo Corp.*, 316 U. S. 624 | 10, 18, 20, 21 |
| *Walling* v. *Fischer Lime & Cement Co.*, 7 Wage Hour Rept. 624 | 14 |
| *Walling* v. *Green Head Bit & Supply Co.*, 138 F. 2d 453 | 14 |
| *Walling* v. *Helmerich & Payne*, 323 U. S. 37 | 11, 12, 13, 14, 15, 17, 18, 22 |
| *Walling* v. *Livernois*, 50 F. Supp. 978 | 14 |
| *Walling* v. *Mueller Furnace Co.*, 50 F. Supp. 561 | 14 |
| *Walling* v. *Stone*, 131 F. 2d 461 | 9 |
| Statute: | |
| Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U. S. C. sec. 201), Section 7 | 2, 15, 16 |
| Miscellaneous: | |
| Interpretative Bulletin No. 4 | 8, 22 |




641581—45——1

# In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 955

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

*v.*

YOUNGERMAN-REYNOLDS HARDWOOD COMPANY, INC.

*ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR PETITIONER

### OPINIONS BELOW

The findings of fact, conclusions of law and opinion of the District Court (R. 94–97) are reported at 6 Wage Hour Rept. 1117. The opinion of the Circuit Court of Appeals (R. 125–127) is reported at 145 F. 2d 349.

### JURISDICTION

The judgment of the Circuit Court of Appeals was entered November 10, 1944 (R. 127). A petition for rehearing was denied December 26, 1944

(R. 136). The petition for a writ of certiorari was filed March 17, 1945 and granted April 2, 1945. The jurisdiction of this Court is based upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

## QUESTION PRESENTED

Whether an employer who is in fact paying his employees piece rates yielding earnings of about 59 cents an hour[1] is excused from paying additional compensation for overtime calculated upon these earnings, by a contract which recites that 35 cents an hour is the "regular rate of pay" and "guarantees" earnings at the piece rates for "regular time and such overtime as the employee may work".

## STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U. S. C. sec. 201) are as follows:

> Sec. 7 (a): No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—
>
> * * * * * *
>
> "(3) For a workweek longer than forty hours after the expiration of the second

[1] The average hourly piece work earnings have been calculated from the actual earnings of respondent's employees for the weeks between April 1, 1943, and the date of the trial, shown in Plaintiff's Exhibit No. 1 (R. 119–121).

year from * * * [the effective] date [of this section],"

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

## STATEMENT

Respondent, a Tennessee corporation, is engaged at Samson, Alabama, in manufacturing lumber for shipment in interstate commerce (R. 94, fdgs. 1–2). In the production of the lumber it employs a number of "stackers" who are engaged in the production of goods for interstate commerce within the meaning of the Fair Labor Standards Act (R. 11–13).

Before the Act became effective and during most of the period thereafter, respondent employed and paid its stackers at agreed piece rates per thousand board feet. Each week it paid the same piece rates during overtime hours as during non-overtime hours of work. Thus, respondent made no provision for paying for overtime hours at one and one-half times the regular rate of pay as required by Section 7 (R. 95–96, fdgs. 6–7, 9).

During 1942 more than one-third of the man-weeks worked involved overtime (R. 95, fdg. 7). In the fall of that year an inspector from the Wage and Hour Division notified respondent that its method of employing the stackers violated the

overtime requirements of Section 7 (*ibid.*). Respondent, however, did not alter its method of payment but, even after this action was commenced,[2] continued to employ the stackers during overtime hours without compensating them at one and one-half times their regular rate of pay. Between April 1, 1943, and the date of the trial September 22, 1943, the stackers worked a total of 134 man-weeks. During 34 of those weeks they worked overtime (R. 119–121; cf. R. 96, fdg. 9), again without added compensation.

On the day before the trial respondent entered into elaborate agreements with its stackers, signed with a mark by each of the illiterate employees (R. 108–109). These contracts provided that—

> The basic or regular rate of pay is 35 cents per hour for the first forty hours each week[3] and for time over forty hours each week the pay shall not be less than one and one-half times such basic or regular rate above mentioned with a guaranty that the employee shall receive weekly for regular time and for such overtime as the employee may work a sum arrived at as follows:
>
> The amount of stacking done by said employee shall be figured on the basis of 80¢

[2] The complaint in this action was filed on March 17, 1943 (R. 1).

[3] At that time the wage order issued by the Administrator for the timber products industry fixed the minimum wage at 35 cents an hour (R. 14).

per thousand board feet of lumber for flat stacking and 70¢ per thousand board feet of lumber ricked.

When these agreements were signed, the explanation given to the stackers was that they would continue to be paid piece rates per thousand board feet just as before, but at the higher rates specified in the contracts. There was no evidence that the stackers understood that the agreement was intended to fix the hourly rate for the purposes of the Fair Labor Standards Act at 35 cents an hour rather than at the average hourly earnings of about 59 cents yielded by the new piece work rates. (R. 63–65.)

From April 1, 1943, until the trial the stackers were paid piece rates of 60 and 70 cents per thousand. During this period they earned at those rates an average of 51 cents an hour (see n. 1, *supra*). At the new rates of 70 and 80 cents per thousand the stackers would earn an average of about 59 cents an hour for all hours, well above the 52½-cent overtime rate which would come into operation during weekly overtime hours if the "regular rate" of 35 cents had real meaning. Hence the new contract, if effective, would enable respondent to pay the specified piece rates uniformly during all hours worked, without higher rates for overtime employment.

The District Court ordered that the complaint be dismissed (R. 97). On appeal, the Circuit

Court of Appeals affirmed the judgment, holding (R. 127)—

> On the day before the trial a new contract had been entered into between the defendant and the stackers, which provided for time and overtime, with a guarantee of additional pay based on the amount of lumber stacked, and the defendant ceased to employ stackers on the basis complained of. Moreover, it was manifest that the defendant had no intention of returning to the method of payment in dispute. We, therefore, agree with the trial court, that there was no necessity for an injunction to prohibit future violations.

On December 26, 1944, the Circuit Court of Appeals denied a petition for rehearing (R. 136).

## SPECIFICATION OF ERRORS

1. The court below erred in holding that the defendants' contracts with the employees in question, entered into the day before the trial, whereby the "regular rate" for computation of overtime premium was asserted to be an hour instead of the employees' hourly piecework earnings, are not in violation of Section 7 of the Fair Labor Standards Act.

2. The court below erred in holding that for this reason no injunction should issue to prohibit future violations and in affirming the judgment of the District Court.

## ARGUMENT

### I

### PAYMENT ACCORDING TO THE STACKERS' CONTRACTS OF EMPLOYMENT WOULD VIOLATE SECTION 7 IN WEEKS IN WHICH OVERTIME WAS WORKED

Under the decision in *United States* v. *Rosenwasser,* 323 U. S. 360, it is clear that Section 7 of the Fair Labor Standards Act applies to piece work employees as well as hourly workers and the words "the regular rate at which he is employed" cover not only hourly rates but also other measures of work and compensation such as "piece rates" or "job prices". See also *Overnight Motor Co.* v. *Missel,* 316 U. S. 572, 579, n. 15. Consequently, respondent must compensate its stackers for all hours in excess of 40 at not less than one and one-half times the regular rate at which they are employed, even though the applicable piece rates may yield enough each week to cover the minimum wage prescribed by Section 6 plus one and one-half times the minimum for overtime. "The Act was designed to require payment for overtime at time and a half the regular pay, where that pay is above the minimum, as well as where the regular pay is at the minimum" (*Overnight Motor Co.* v. *Missel, supra,* at 578).

This requirement does not straitjacket respondent by requiring it to put its piece workers on hourly rates. Respondent may continue to pay piece work rates and comply with Section 7, as it

is now administered, in either of two ways. One method is to pay the established piece rates for all hours worked, including the overtime hours, and then to translate them into an average hourly rate by dividing the number of hours worked into the total compensation paid at the piece rates. One-half the hourly rate thus obtained is then multiplied by the number of hours of overtime. The result is the extra compensation which must be paid to the piece workers in order to comply with Section 7.[4] Thus, under this method the piece work earnings are "translated or reduced by computation to an hourly basis for the sole purpose of determining whether the statutory requirements have been fulfilled" (*United States* v. *Rosenwasser, supra,* 364).

---

[4] See Interpretative Bulletin No. 4, par. 8: "Where an employee is employed on a piecework basis, his regular hourly rate of pay is computed by dividing the total weekly piecework earnings (including production bonuses, if any) by the number of hours worked in the week. For his overtime work the pieceworker is entitled to be paid a sum, in addition to his weekly piecework earnings, equivalent to one-half the regular hourly rate of pay multiplied by the number of hours worked in excess of 40 in the week. Thus if the total piecework earnings in any workweek of 46 hours are $23, the regular hourly rate of pay is 50 cents. For the 6 hours of overtime, the employee is entitled to $1.50 (6 hours x 25 cents) additional compensation; for the week's work he is entitled to a total of $24.50. In other words, since the regular hourly rate of pay is 50 cents an hour, the employee is entitled to be paid an amount equal to 50 cents an hour for 40 hours and 75 cents an hour for the excess 6 hours, or a total of $24.50."

A second method which the Administrator, as a matter of enforcement policy, has accepted as constituting compliance, is to raise the piece rates 50 per cent during the overtime hours. For example, since respondent pays its stackers 70 cents a thousand board feet for ricking and 80 cents a thousand for stacking during their first 40 hours of work, it can comply with Section 7 by paying $1.05 and $1.20 a thousand during overtime hours.[5]

Respondent has refused to follow either of these alternatives. Until the day before the trial it persisted in paying its stackers constant piece rates of 60 and 70 cents a thousand during all

[5] The Administrator has never been certain that this second method of payment is in strict compliance with the Act, and the Court's statement in the *Rosenwasser* case (p. 364) that piece work earnings must be reduced to an hourly basis for the purpose of determining compliance would seem to indicate, if read literally, that payment of one and a half times the applicable piece rate for each piece of work done during overtime hours would not constitute compliance with Section 7 if the employee completed fewer pieces during each hour of overtime than during each of his first 40 hours of work. On the other hand, the Court's statement can be read to refer only to Section 6; and the Circuit Court of Appeals for the Seventh Circuit has held that to pay one and one-half times the piece rates is sufficient. *Walling* v. *Stone*, 131 F. 2d 461, 464 (C. C. A. 7). Moreover, whatever the strictly correct rule of law may be determined to be, this second method of computing overtime is more practicable under some circumstances than to translate the piece rate earnings to an hourly basis, and it ordinarily results in substantial compliance with Section 7. In view of all these circumstances, the Administrator, in enforcing the Act, treats both methods of computing overtime as compliance.

hours of employment.* Since the stackers often worked more than 40 hours a week—one-fourth of the man-weeks between April 1, 1943, and the day of the trial included overtime (R. 119–121)—but were never paid any extra compensation for the overtime hours, this was a plain violation of Section 7. *United States* v. *Rosenwasser, supra.*

The contracts executed the day before the trial did not alter this arrangement. Their sole purpose was to legalize and preserve it. Respondent "guaranteed" that as in the past it would pay the specified piece rates, yielding about 59 cents an hour, uniformly for all hours of work and provided that these payments should be deemed to include compensation for overtime at not less than one and one-half times the rate of 35 cents an hour, which was labeled the "regular rate of pay". Obviously, the 35-cent rate was not the basis of the stackers' normal, non-overtime compensation, which was determined by the piece rates actually paid, but was simply an artificial, fictitious rate amounting to only 60 percent of the actual hourly

* In its Brief in Opposition respondent made much of the concession in the Administrator's brief in the Circuit Court of Appeals that this was done in good faith. The point which was conceded was that respondent was acting on the advice of counsel, without fraud or concealment, and probably in the honest belief that the new contracts were valid under *Walling* v. *Belo Corp.*, 316 U. S. 624. There is no inconsistency between this concession and the obvious fact that respondent has been seeking at all times to circumvent the policy of Section 7 and pay constant piece rates for all hours of work.

rate of pay. This so-called "regular rate" was never actually paid. It was not intended or used for any other purpose than to avoid the payment of true overtime compensation.

The record establishes this fact in three ways: First, respondent's counsel admitted at the opening of the trial (R. 15)—

> We know, from past experience, that we will pay them more [than the hourly rates], because they will earn more money by stacking lumber.

Second, the figures for six weeks in 1942, selected by respondent as representative, show that even at the old rates of 60 and 70 cents a thousand board feet, the stackers earned 65 percent more than the 35 cent hourly rate and that on occasion they earned double that figure (Defendant's Exhibit 1, R. 106–107): Third, analysis of the payroll for the four months immediately preceding the trial shows that at piece rates 15 percent lower than the rates to be paid under the new contract the stackers were regularly earning 51 cents an hour (R. 119–121).

Since the piece rates are the only actual rates of pay, the requirements of Section 7 are not satisfied by payment of one and one-half times the fictitious 35 cent rate which the contract labeled "regular". In *Walling* v. *Helmerich & Payne*, 323 U. S. 37, the Court held that the term "regular rate" does not refer to some artificial rate which the parties choose to call the "regular rate" in

their contract and that overtime must be based "upon the wages actually received" during "the hours actually and regularly spent each week in working" (323 U. S. at 41). The opinion states (p. 40) that—

> While the words "regular rate" are not defined in the Act, they obviously mean the hourly rate actually paid for the normal, non-overtime workweek.

This interpretation was reaffirmed in *United States* v. *Rosenwasser, supra,* at p. 363.

In the instant case the "rate actually paid for the normal, non-overtime workweek" is the piece rate of 70 or 80 cents an hour according to the nature of the work. Translated to an hourly basis under the formula approved in the *Rosenwasser* case, it averages about 59 cents an hour, the result obtained by dividing each stacker's piece rate earnings in a given week by the number of hours worked. Respondent, however, did not pay or propose to pay one and one-half times this rate for overtime. The stackers are to receive the constant piece rates for all hours worked and no extra compensation whatever during overtime hours. The arrangement set up by the new contracts, therefore, like that previously prevailing, is in plain violation of Section 7 as construed in the *Helmerich & Payne* and *Rosenwasser* decisions.

The Circuit Court of Appeals sustained the new contract on the ground that it "provided for time

and overtime, with a guarantee of additional pay based on the amount of lumber stacked" (R. 127). The underlying thought appears to be that the parties were free to agree in the employment contract that 35 cents an hour should be the "regular rate" for purposes of Section 7 even though the piece rates yielding 59 cents an hour were the actual rates of pay. But on this point, also, the opinion of *Walling* v. *Helmerich & Payne* is explicit (323 U. S. at 42)—

> It is no answer that the artificial regular rate was a product of contract or that it was in excess of the statutory minimum. The Act clearly contemplates the setting of the regular rate in a bona fide manner through wage negotiations between employer and employee, provided that the statutory minimum is respected. But this freedom of contract does not include the right to compute the regular rate in a wholly unrealistic and artificial manner so as to negate the statutory purposes. Even when wages exceed the minimum prescribed by Congress, the parties to the contract must respect the statutory policy of requiring the employer to pay one and one-half times the regular hourly rate for all hours actually worked in excess of 40. Any other conclusion in this case would exalt ingenuity over reality and would open the door to insidious disregard of the rights protected by the Act.

Even before the *Helmerich & Payne* decision several lower Federal courts had held contracts to be invalid which were designed to enable the employer to pay the same wage during both regular and overtime hours. In *Carleton Screw Products Co. v. Fleming*, 126 F. 2d 537 (C. C. A. 8), certiorari denied because petition out of time, 317 U. S. 634, the court concluded that Section 7 cannot be circumvented by a contract dividing a constant hourly wage into a "regular rate of pay" and a "bonus" which is excluded from the computation of overtime. Similarly, in *Walling* v. *Green Head Bit & Supply Co.*, 138 F. 2d 453 (C. C. A. 10), the contract was held invalid because the employees received the same hourly wage during both regular and overtime hours under a provision reducing the "regular rate" whenever overtime was worked so that the "regular rate" plus "overtime" would result in the constant wage. In other cases, the principle was stated much as in the *Helmerich & Payne* decision. *Walling* v. *Fischer Lime & Cement Co.*, 7 Wage Hour Rept. 624 (W. D. Tenn.). See also *Walling* v. *Mueller Furnace Co.*, 50 F. Supp. 561, 562 (E. D. Wisc.); *Walling* v. *Livernois*, 50 F. Supp. 978 (E. D. Mich.); *Scott* v. *Atlas Press Co.*, 49 F. Supp. 260 (W. D. Mich.). Under these cases, as under this Court's decision in *Walling* v. *Helmerich & Payne, Inc.*, the label used in a contract cannot be regarded as decisive and Section 7

must be read to refer to the actual rate at which the employees are regularly compensated.

On principle, also, it is clear that Section 7 must be read to refer to the actual rate of compensation established as a result of wage negotiations between employee and employer, rather than to a fictitious rate which the parties agree to label the "regular rate" without regard to the employees' actual compensation for non-overtime employment. Section 7 has two purposes: (1) to spread employment by making it more costly to employ a small number of workers in excess of 40 hours a week than it would be to employ a sufficient number to do the same amount of work in 40 hours; and (2) to secure extra compensation to employees for the burden of an overtime workweek. *Overnight Motor Co.* v. *Missel, supra; Walling* v. *Helmerich & Payne, Inc., supra.* To achieve these purposes, Section 7 provides that no employer shall employ any employee engaged in commerce or in the production of goods for commerce for more than 40 hours a week without compensating him for the overtime hours "at a rate not less than one and one-half times the regular rate at which he is employed". This provision obviously contemplates that employees and employers will agree upon the employees' normal compensation by individual or collective negotiations. Provided that the minimum hourly rates established under Section 6 are paid, the parties are entirely free to fix, and alter as they wish,

the method of compensation and the rate at which the employees will be employed during the regular, 40-hour workweek. After that rate is established, Section 7 comes into play and requires the employer to pay for any overtime hours a rate 50 per cent higher than the rate he pays for non-overtime employment under the contract of employment. In the present case, respondent and the stackers are free to agree upon the regular compensation for which the stackers will work, but after they have established as the actual basis of compensation the piece rates of 70 and 80 cents a thousand, yielding 59 cents an hour, they have no choice as to the application of Section 7 which makes it obligatory for respondent to pay rates 50 per cent higher during any overtime hours, *i. e.*, piece rates of $1.05 and $1.20 a thousand or 88½ cents an hour. In this way Section 7 operates to effectuate the legislative purposes: the employer's labor costs are increased 50 per cent at the end of the 40-hour week, which is an inducement to reduce hours of work and employ more labor; and the employees receive a 50 per cent premium during any overtime hours, which compensates them for the undue length of their workweek.

But the purposes of Section 7 can be easily frustrated and its incidence will be arbitrary and capricious if the words "regular rate" are to be interpreted to mean any rate which the parties may label the "regular rate of pay" in the em-

ployment contract. The dangers are illustrated by the present case. The contracts signed the day before trial plainly reveal that respondent and the stackers intended to, and did, fix piece rates of 70 and 80 cents per thousand as the actual rates of compensation at which the stackers would be regularly employed. Under the basic theory of Section 7, the wages paid by respondent should be increased 50 per cent in overtime hours to $1.05 and $1.20 per thousand board feet of lumber stacked, or 88½ cents an hour; yet if the "regular rate" for the purposes of Section 7 is the 35 cents an hour labeled as "the regular rate" in the contracts of employment, the respondent's labor costs will be constant throughout the workweek and the stackers will receive no overtime premium for overtime hours. Thus, under respondent's interpretation Section 7 is nullified by the simple device of labeling 35 cents an hour as "the regular rate of pay". The essential sanction of the Act would largely disappear and its effectiveness would be seriously impaired under this interpretation.

Respondent's interpretation, moreover, is inconsistent with the settled rule that the provisions of the Fair Labor Standards Act cannot be set aside by private contracts. *Tennessee Coal Co.* v. *Muscoda Local,* 321 U. S. 590; *Walling* v. *Helmerich & Payne,* 323 U. S. 37. Although respondent and the stackers were free to agree here upon the stackers' compensation for the normal, non-overtime workweek, they could not after

having made that bargain stipulate directly that the stackers should receive no premium for hours in excess of 40. "Private contracts made before or after the passage of legislation regulating overtime cannot take the overtime transactions 'from the reach of dominant constitutional power'." *Overnight Motor Co.* v. *Missel, supra,* at 577. Equally, respondent and the stackers should not be free to set aside Sec a 7 by the more devious method of agreeing that the actual compensation shall be determined by piece rates yielding approximately 59 cents an hour but that nevertheless 35 cents an hour shall be treated as "the basic or regular rate of pay" in computing overtime compensation. For the latter provision is merely an express waiver of Section 7 cloaked in a different and somewhat more complicated form of words. *Walling* v. *Helmerich & Payne, Inc.,* 323 U. S. 37, 42.

*Walling* v. *Belo Corporation,* 316 U. S. 624, does not sanction such an arrangement. In that case the employer was not attempting to justify paying his employees the same piece rates without regard to hours worked, thus keeping wages and labor costs constant for both regular and overtime hours. The parties had agreed that the employees should be paid a regular hourly rate of 67 cents an hour and not less than one and one-half times that rate for overtime, but the employer had also guaranteed the employees a weekly "take home" or salary of at least $40. The Court did not, as

respondent argues, view as decisive the assertion in the contract that the regular rate was 67 cents an hour. It recognized that "the problem is whether the intention of the parties to set 67 cents an hour as the regular rate squares with their intention to guarantee a weekly income of $40" (316 U. S. at 631). And it concluded, for two reasons, that the former intention was not overridden by the latter. The first of these reasons was that, under the contract, when an employee worked more than 54½ hours in a single week, he was entitled to and did receive (over and above the $40 guaranty) compensation for each additional hour at one and one-half times 67 cents, the regular rate specified. "In this situation, then, it is clearly the guaranty that becomes inoperative and the 67 cent hourly rate fixed by the contract that is controlling" (316 U. S. 632).

The Court's second reason for concluding that the $40 guaranty did not override the provision of the contract which specified 67 cents as the regular rate of pay was this. Section 7 requires that overtime hours be compensated at *"not less than"* 150 percent of the regular rate; it does not prohibit paying more. Hence, the Court reasoned, the fact that when an employee worked less than 54½ hours a week his pay was determined by the $40 guaranty does not show that the 67-cent rate was inoperative in that week. "The question remains whether the $40 contemplates compensation for overtime as well as basic pay."

And the Court took the view that it did; that, for example, "if an employee works 50 hours in a given week, it might reasonably be said that his $40 wage consists of $29.48 for the first 44 hours (44 x $0.67) plus $10.52 for the remaining six hours (6 x $1.753)." By this reasoning, the Court concluded that the basic straight time rate did not vary in workweeks of different length; that the fluctuation occurred in the amount of the premium for overtime (316 U. S. 632).

The *Belo* case has no application to the present case because no guaranty of a fixed weekly wage is here present. Even if respondent's reasoning (Br. in Opp., 12) were to be adopted, however, and assurance of a fluctuating weekly income determined by piece rates instead of the lower hourly rate were to be regarded as a valid substitute, it would still be necessary to ask "whether the intention of the parties to set [35] cents an hour as the regular rate squares with their intention" to apply the piece rates. (316 U. S. 631.) It is submitted that it does not; that the former intention is clearly overridden by the latter. In the first place, it is not true here as it was in the *Belo* case, that after an employee has worked a particular number of hours (54½ in the *Belo* case), the specified 35 cent "regular rate" will control the amount of his compensation. No matter how long an employee's workweek, his earnings are still determined by the piecework rates and by them alone. For, as we have shown, *supra*, pp. 5-11, the piecework rates yield average hourly earnings

of 59 cents an hour, whereas 150 percent of the 35 cent "regular rate" amounts to only 52½ cents. Neither the 35 cent nor the 52½ cent rate ever determines an employee's actual compensation. Secondly, on the facts of this case, it is clear that the guaranteed piecework earnings do not (as the Court in the *Belo* case concluded the guaranteed weekly salary did) "contemplate[s] compensation for overtime as well as basic pay" (316 U. S. at 632), with an invariant basic straight time rate and a fluctuating overtime premium. For the employees here involved work less than 40 hours in most workweeks (R. 119–121). In workweeks of 40 hours or less, the same piece rates are paid and piecework earnings are necessarily allocable wholly to basic, non-overtime pay; surplus earnings over and above the stipulated 35 cent hourly rate cannot be excluded in the calculation of the actual regular rate of pay by viewing them as part of the premium paid for overtime hours since there are no overtime hours. And if the piecework earnings are wholly straight-time compensation in the great majority of workweeks, it would obviously sanction evasion of the requirements of the Act to permit the parties to treat some part of those earnings as allocable to overtime premium in the relatively few workweeks in which overtime is worked.

The *Belo* case comes only to this: On the facts before it, the Court upheld the contracts because it took the view that they "were intended to, and did, really fix the regular rate at which each em-

ployee was employed" at 67 cents an hour (316 U. S. at 629–630). The Court's statement (p. 631) that "it is agreed that as a matter of law employer and employee may establish the 'regular rate' by contract" refers only to an agreement fixing the actual rate of pay. Nothing in that decision permits an employer to agree that for the purposes of Section 7 the "regular rate" shall be less than the actual hourly earnings, which in this case result solely from the stipulated piece rates in all workweeks.[7]

---

[7] This has been the consistent position of the Administrator of the Wage and Hour Division. Interpretative Bulletin No. 4 (November 1938, revised November 1940), paragraph 25, gives the following illustration:

"An employee is now employed on a piece-rate basis. The employer will announce that henceforth the employee will be employed at an hourly rate of 30 cents an hour for 42 hours and 45 cents an hour for all hours in excess of 42, although the employee will continue to receive his full piecework earnings at the present piece rates. Obviously, 30 cents is not the regular rate of pay; it is not the rate at which the employee is actually paid. The case is no different if the employer adopts a rate in excess of the minimum. So long as the employer continues actually to pay at the piece rates now in effect, the regular rate of pay will be determined by dividing the piecework earnings by the hours worked each week, and the employee will be entitled to time and one-half that rate for hours worked in excess of 42 [40]."

Administrative interpretations of the Fair Labor Standards Act, although not issued as regulations under statutory authority, carry persuasiveness as an expression of view of those experienced in the administration of the Act and acting with the advice of a staff specializing in its interpretation and application. *Overnight Motor Co.* v. *Missel, supra; Walling* v. *Helmerich & Payne, Inc., supra.*

## II

### THE BASIS FOR THE LOWER COURT'S CONCLUSION THAT AN INJUNCTION IS UNNECESSARY, NAMELY THAT THE NEW CONTRACTS OF EMPLOYMENT COMPLY WITH THE ACT, DISAPPEARS IF THESE CONTRACTS ARE ILLEGAL

In its Brief in Opposition (pp. 8–12) respondent argued that the courts below did not rule on the validity of the employment contracts executed the day before trial but denied the injunction as unnecessary to secure compliance with the Act. There is no merit in this contention. The opinion of the Circuit Court of Appeals fully discloses that its decision was predicated on a ruling that payment under the new contracts would meet the requirements of Section 7:

> On the day before the trial a new contract had been entered into between the defendant and the stackers, which provided for time and overtime, with a guarantee of additional pay based on the amount of lumber stacked, and the defendant ceased to employ stackers on the basis complained of. Moreover, it was manifest that the defendant had no intention of returning to the method of payment in dispute. We, therefore, agree with the trial court, that there was no necessity for an injunction to prohibit future violations. (R. 127.)

The District Court's finding is in almost identical language. (R. 96.)

It is clear, moreover, that neither of the courts below could have denied the Administrator's prayer for relief without holding that payment under the new contracts would meet the requirements of Section 7. The complaint alleged that respondent was violating Sections 7 and 15 (a) (2) by employing its stackers on a piece work basis for more than 40 hours a week without compensating them for overtime at one and one-half times the regular rates at which they were employed, and prayed for an injunction restraining respondent from continuing to violate those provisions of the Act (R. 5–6). Upon proof of these allegations, the Administrator became entitled to the relief requested unless the court was satisfied that no future violations were threatened. The courts below denied an injunction because they were of the view that the new employment contracts meet the requirements of Section 7. Since, as we have shown, these agreements do not constitute compliance, an injunction must issue.

Respondent has also suggested that no injunction should issue because it does not appear that the stackers are now being employed for more than 40 hours a week. The evidence shows, however, that during 1942 more than one-third of the man-weeks worked involved overtime (R. 95, fdg. 7) and that between April 1, 1943 and the date of the trial, one-fourth exceeded 40 hours (R. 119–121; cf. R. 96, fdg. 9). Moreover, if overtime were not contemplated, there was no reason

for drawing the elaborate contracts the day before the trial in the effort to legalize the payment of constant piece rates for all hours. Respondent's action in securing these contracts is a plain indication that continued overtime work was contemplated and that payment of the stackers in accordance with the unlawful contracts was intended. Accordingly, an injunction should issue restraining violations of the Act.

## CONCLUSION

For the foregoing reasons, the judgment of the Circuit Court of Appeals should be reversed.

Respectfully submitted.

HUGH B. COX,
*Acting Solicitor General.*
IRVING J. LEVY,
RALPH F. FUCHS,
*Department of Justice.*

DOUGLAS B. MACGS,
*Solicitor of Labor.*
ARCHIBALD COX,
*Associate Solicitor,*
*United States Department of Labor.*

APRIL 1945.

U. S. GOVERNMENT PRINTING OFFICE: 1945

FILE COPY

Office - Supreme Court, U. S.
FILED
MAR 17 1945
CHARLES ELMORE CROPLEY

# In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 955

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

YOUNGERMAN-REYNOLDS HARDWOOD COMPANY, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

## BRIEF FOR THE RESPONDENT IN OPPOSITION.

THE PARAGON PRESS, MONTGOMERY

# INDEX


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 2 |
| Question presented | 2 |
| Statute involved | 3 |
| Statement | 3 |
| Reasons for granting the writ | 8 |
| Conclusion | 17 |


## CITATIONS

Cases:


| | |
|---|---|
| *Hecht Company v. Bowles*, 88 L. ed. 465 | 9 |
| *Fleming vs. Belo*, 316 U. S. 624 | 7 |
| *Petroleum Exploration v. Public Service Commission*, 304 U. S. 209 | 9 |
| *Harrisville v. Dickey*, 289 U. S. 334 | 9 |
| *Truly v. Wanzer*, 5 How. 142 | 9 |
| *United States v. Rosenwasser*, 89 L. ed. 249 | 11 |
| *Fleming v. Hoerman, d. b. a. Lyndon Broom Co.*, (DC Kan.; 1942) 6 Labor Cases Sec. 61283 | 11 |
| *Fleming v. National Bank of Commerce of Charleston*, (DC W. Va.; 1941) 41 Fed. Supp. 833 | 11 |
| *Walling v. T. Buettner and Co.*, (CCA-7; 1943) 6 Labor Cases Sec. 64,445 | 11 |

# INDEX


Page

*Walling v. John J. Casale, Inc.*, (DC N. Y.; 1943) 6 Labor Cases Sec. 61,524 ..... 11

*Fleming v. W. E. Lipshutz, d. b. a. Monarch Co.*, (DC Ga.; 1943) 6 Labor Cases Sec. 61,490 ..... 11

*Walling v. Emery Wholesale Corp.*, (DC, Ga.; 1943) Affirmed 138 F (2) S 48 ..... 11

*Walling v. W. B. Pine*, (DC, Okla.; 1942) 6 Labor Cases Sec. 61,189 ..... 11

*Fleming v. Phipps*, 35 F. Supp. 627 ..... 11

*Walling v. Helmerich & Payne, Inc.*, 89 L. ed. 1 ..... 15

STATUTE:

Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U. S. C. A., Sections 7a and 15 ..... 3

# In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 955

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

YOUNGERMAN-REYNOLDS HARDWOOD COMPANY, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

*Brief for the respondent in opposition.*

## OPINIONS BELOW

The findings of fact, the opinion, conclusions of law and the judgment of the District Court denying the petition for injunction and dismissing the case appear in the record from pages 94 to 97.

The opinion of the Circuit Court of Appeals for the Fifth Circuit affirming the District Court appears in

the record from pages 125 to 127. The opinion is reported at 145 F. (2), 349.

## JURISDICTION

The Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended.

## QUESTION PRESENTED

Petitioner sought to enjoin the respondent from violation of the Fair Labor Standards Acts. The issue was whether under the facts the respondent had intentionally violated the law and intended to continue violation.

The District Court found that the defendant "did not intentionally violate the law" and had "ceased such practices and has manifested a desire and willingness to fully conform to the provisions of the law"; and on the basis of the principle that "the purpose of an injunction is not to punish a defendant for past acts but to deter a defendant from future unlawful acts" the Court concluded that there was "no necessity for an injunction." (Quotations are from the finding of facts, opinion and conclusions of law).

The Circuit Court of Appeals was of the opinion that ". . . a new contract had been entered into . . . which provided for time and overtime, with a guarantee of additional pay based on the amount of lumber stacked, and the defendant had ceased to employ stackers on the basis complained of" and that ". . . it was manifest that the defendant had no intention of returning to the method of payment in dispute" and agreed with the trial court that there was no necessity for an injunction to prohibit future violations.

The only question that could here be raised would be whether under the facts the trial court abused its discretion in denying the injunction.

The answer to the question involves only the application of *Hecht Company vs. Bowles*, 88 L. ed. 465, and *Fleming vs. Pelo*, 316 U. S. 624.

## STATUTE INVOLVED

The statute involved is the Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U. S. C. A., Sec. 201), Section 7a of which provides for overtime, and Section 15 of which gives the district court jurisdiction for cause shown to restrain violation. This statute will hereafter be referred to as the Act.

## STATEMENT

The complaint charged several violations of the Act. All charges were abandoned except the alleged violation of the overtime provisions of the Act.

The respondent operated a saw mill at Samson, Alabama. All employees except the lumber stackers were paid on an hourly basis and were fully paid for all time and overtime. The staskers were paid on a piece rate basis.

Lumber stacking is common labor. It consists of the simple unskilled work of picking up boards and placing them in a stack. The custom in the lumber industry has always been to pay the stackers on a piece rate basis. Although the stackers are common laborers, nevertheless they make nearly double the wages of other common laborers working on an hourly basis. They work for the most part independently of the other operations of the mill. The system is described by Youngerman, president of the defendent company, at

page 78 of the record. The lumber goes through the mill and then to the green chain where hourly paid men take the lumber off, sort it and put it on various wagons of lumber dollies which are then moved away by hourly paid men to a place where the stacking is to be done. At that point hourly paid employees remove the lumber from the dollies and leave the lumber in separate piles. At this point the work of the hourly paid employees ceases and from that point on the stackers take over. They work on a piece rate basis.

The stackers go to work when they choose, work as long as they want to, and stop when they get ready. Some of them come early in the morning before the mill has started and work in the cool of the morning. Later in the day when it gets hot they will quit and then come back later on in the cooler afternoon hours and do some more stacking. They quit work when it rains and virtually work when and as they please. Although they are common laborers the nature of their work is such that they work practically without supervision and at such hours as they see fit. It is almost universal in the trade for this kind of common labor to work on a piece rate basis at an agreed price for the amount of lumber stacked. (R. pages 77, 78, 79).

Prior to the Act respondent had employed the stackers on a piece rate basis of an agreed amount per thousand board feet of lumber stacked. At one time the company put the stackers on an hourly pay basis. They threatened to quit and it was necessary to put them back on a piece rate basis. (R. 95).

Petitioner had sent inspectors to the defendant's mill for an inspection some time in 1940. (R. 72). At that time the question of the stackers came up and the inspectors told respondent's president, Youngerman, that his piece rate pay system was all right. Later, a

second inspection was made in 1941 and again the inspectors told Youngerman that his piece rate basis was satisfactory.

There was a third inspection in the fall of 1942. It was then for the first time that Youngerman was told that his piece rate basis of paying the stackers without extra pay for overtime hours was a violation of the law. (R. 95). The defendant soon afterwards ceased to work the stackers any overtime hours[1]. After the suit was filed the amounts paid thereafter to the stackers was as an advance on their wages and the final payroll record was held in suspense until the company could find out what its duty was and this admittedly was done in good faith[2].

The day before the trial new contracts were drawn up with the stackers modeled after the contract involved in the *Belo* case. These contracts were read to the employees, were signed by them and by the company, and a copy was given to them and they are valid employment contracts unless made invalid by the act involved in this case. They were not "elaborate" as described in the petition but were simple employment contracts. (See Appendix).

The trial court found the following facts with reference to the amount of overtime worked: (R. 95).

1940. "During most of the year 1940 the stackers were taken off of the per thousand basis and were put

---

[1] The statement in the petition here at page 4 that "Respondent . . . continued to employ the stackers during overtime hours . . . without compensating them at one and one-half times the regular rate of pay" is in conflict with the trial court's finding of fact, paragraph 6, (R. 95). The tabulation of wages paid (R. 115) shows an abrupt end of overtime weeks during the early part of September in the fall of 1942 and no further overtime (with two possible isolated exceptions) during the balance of 1942 and the spring of 1943 until the date of the suit on March 17, 1943.

[2] It is admitted in petitioner's brief (p. 3) on the original submission in the Circuit Court of Appeals that "These steps were taken in good faith and on advice of counsel."

on an hourly basis and were paid time and a half for all overtime worked."

1941. "During 1941 from January to May, the stackers were not worked any overtime and from May to the end of the year there was very little, if any, overtime worked."

1942. "During 1942, out of approximately 234 man weeks of work approximately 87 man weeks were overtime . . . During the fall of 1942 one of the plaintiff's inspectors notified the defendant that it was a violation of the law to work the stackers on a piece rate basis without paying time and a half for overtime . . . The defendant soon afterwards ceased to work the stackers any overtime . . ."

1943. ". . . from January 1, 1943, until the time of the filing of the suit, no overtime was worked." "After the suit was filed there was some overtime worked and the defendant continued to pay the amount which would be due on the piece rate basis but held its books in suspense so that the amount paid would be considered as an advance and if it should owe any additional amount of overtime it could be paid."

Thus during the years 1940, 1941, 1942 and 1943 to the date the action was filed the trial court found that there was no substantial amount of overtime worked except during the early part of 1942 when about one-third of the man weeks were overtime but when the inspector notified the defendant that its system of pay was not in compliance the defendant ceased to allow the stackers to work any overtime.

When the suit in this case was filed in the early part of 1943 it became apparent that the petitioner was attacking the piece rate system of pay. *United States vs. Rosencasser* had not at that time been decided and as stated in paragraph 8 of the finding of facts, "The

language of the statute applicable to overtime is not sufficiently explicit to make it clear to a layman that it is a violation of the law to work a stacker on a piece rate basis without additional compensation for overtime." Petitioner was charging that piece rate pay was a violation but the stackers were not willing to work on an hourly basis. Eventually, therefore, a pay system was adopted which would provide for overtime compensation so as to meet the contention of petitioner and at the same time permit the stackers to receive as incentive pay an additional amount based on the amount of lumber stacked. This system was developed and was put into effect the day before the trial. The new pay system was adapted from the principle of the *Belo* case[3].

The petition here sets out only a part of the employment contract. The entire contract is for convenience shown in the Appendix.

It should be kept in mind that no question of straight time pay was involved in the case and that the only question was with reference to weeks where the stackers work more than 40 hours, and that the employment contracts were entered into the day before the trial and consequently there had been no work, overtime or otherwise, under these contracts.

It was not the duty of the district court to assume that at some future time the stackers would work overtime so as to raise the question as to the validity of the contracts.

The contracts served to show that the defendant had abandoned the practice complained of. Whether the company would or would not in the future allow the stackers to work overtime hours was a matter which could not be known ahead of time. Overtime weeks

[3] *Fleming vs. Belo Corp.*, 316 U. S. 624.

had been relatively few. There had been periods when there had been no overtime weeks at all, as, for instance, all of 1941, part of 1942, and the spring of 1943. It would not be permissible to go outside of the record and here state that there has been no overtime worked since the trial of this case but it would be proper to say that it would be fair to assume that the defendant having tasted the bitter experience of being brought into expensive litigation because of a small amount of overtime work might well have decided that it would not permit any future overtime work at all. The validity of the agreements would come into question only if overtime was worked.

Thus it was that the trial court merely held that the defendant "had ceased to employ its stackers on the basis complained of," the straight piece rate basis. Neither it nor the Circuit Court of Appeals undertook to pass upon the question whether if overtime should be worked the provisions of the contracts would satisfy the overtime requirements of the Act.

## REASONS FOR NOT GRANTING THE WRIT

The sole question for decision in the trial court was whether an injunction was necessary to prevent violation. The sole question for decision in the Circuit Court of Appeals was whether under the facts found by the District Court[1] it had abused its discretion in denying the injunction.

Section 17 of the Fair Labor Standards Act provides: "The District Court . . . shall have jurisdiction *for cause shown* to restrain violations . . ." (Emphasis supplied).

[1] Rule 52 provides in part: "Findings of fact shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

It is clear that except where a statute gives an absolute right, the granting or refusal of an injunction rests in the sound discretion of the court.[1]

The power of courts to issue an injunction should be exercised sparingly and with great caution.[2]

The Emergency Price Control Act of 1942 (Section 205a) provides that the administrator under that statute may make application for an order enjoining violation and "upon a showing . . . a permanent or temporary injunction . . . shall be granted."

In *Hecht Company vs. Bowles*, 88 L. ed. 463, decided February 28, 1944, the administrator applied for an injunction under the act just mentioned and was able to prove certain violations. The district court found that the violations were made without "intent to violate the regulations" and that the issuance of an injunction would have "no effect by way of insuring better compliance in the future." This Court sustained the discretion of the district court and wrote as follows:

> "We are dealing here with the requirements of equity practice with a background of several hundred years of history. Only the other day we stated that 'An appeal to the equity jurisdiction conferred on federal district courts is an appeal to the sound discretion which guides the determinations of courts of equity.' Meredith v. Winter Haven, 320 U. S. 228, 235, ante, 1, 4; 64 S. Ct. 7. The historic injunctive process was designed to deter, not to punish. The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each degree to the neces-

---

[1] *Petroleum Exploration vs. Public Service Com.*, 304 U. S. 209, at 218. *Harrisonville vs. Dickey*, 289 U. S. 334 at 337, 338.

[2] "There is no power, the exercise of which is more delicate, which requires greater caution, deliberation, and sound discretion, or more dangerous in a doubtful case, than the issuing an injunction." *Truly vs. Wanzer, et al.*, 5 How. 142

sities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjudgment and reconciliation between the public interest and private needs as well as between competing private claims."

In the case at bar the district court in its opinion wrote: (R. 97).

> "The individuals operating the defendant corporation in this case are laymen and are not skilled in interpreting and construing new laws. They no doubt reached the conclusion that under their arrangement with the lumber stackers they were paid wages which amounted to as much or more than the minimum wage prescribed in the act with time and a half paid for all overtime and that as this arrangement was satisfactory to both the employer and the employee that they were acting within the spirit and intention of the law that they were not required to pay any additional amount. In this conclusion, if the construction placed on the act by the administrator and some of the courts is right, the defendant was wrong. But in the opinion of this court it was not such wrong and there was not such intentional violation of the law resulting therefrom as to call for injunctive relief especially where there is evidence, as there is in this case, that the defendant has ceased such practices and has manifested a desire and willingness to fully conform to the provisions of the law."

There are other cases where such discretion has been exercised and injunction has been refused where the

violations had ceased or there was no reason to apprehend future violations.

At the time of the decision of the district court (October 25, 1943) the case of *United States vs. Rosenwasser*, 89 L. ed. 249, (January 2, 1945) holding that piece workers are within the overtime provisions of the Act, had not been decided but the trial court here assumed without deciding that such was the law but found that the failure to comply had not been an intentional violation but a lack of understanding. That the proper construction of the overtime provisions of the Act was not without difficulty is indicated by the fact that the decision of this court in the *Rosenwasser* case was not unanimous.

The trial court found that the defendant had "manifested a desire and willingness to fully conform to the provisions of the law." There was therefore not necessary to compel the defendant to do what it was manifestly willing to do.

The trial court was not willing to declare that unintentional noncompliance by the defendant company made it necessary to place upon it the stigma of being a law violator. In reaching its conclusion that court had the opportunity of seeing the witnesses, of observing their demeanor, of judging their credibility and of deciding whether an injunction was necessary.

---

*Fleming v. Hoerman, d. b. a. Lyndon Broom Co.*, (DC Kan.; 1942) 6 Labor Cases Sec. 61283.

*Fleming v. National Bank of Commerce of Charleston*, (DC, W. Va.; 1941) 41 Fed. Supp. 833.

*Walling v. T. Buettner and Co.*; (CCA-7; 1943) 6 Labor Cases Sec. 61,445, February 11, 1943.

*Walling v. John J. Casale, Inc.*, (DC N. Y.; 1943) 6 Labor Cases Sec. 61,524, March 26, 1943.

*Fleming v. W. E. Lipshutz, d. b. a. Monarch Co.*; (DC Ga.; 1943). 6 Labor Cases Sec. 61,490, February 12, 1943.

*Walling v. Emery Wholesale Corp.*, (DC, Ga.; 1943) Affirmed 138 F (2) S 48.

*Walling v. W. B. Pine*, (DC, Okla.; 1942) 6 Labor Cases Sec. 61,189, June 24, 1942.

*Fleming v. Phipps*, 35 F. Supp. 627.

The petitioner here does not seem to question the proper exercise of the trial court's discretion in denying the injunction but seeks to raise a hypothetical issue as to whether if the employer should allow the stackers to work overtime hours it could properly pay them in accordance with the contract. The "question presented" is stated to be

> "Whether an employee . . . is excused from payment . . . for overtime . . . by a contract . . . etc."

This question would not arise until overtime had been worked. That it is a hypothetical question is indicated by the fact that neither of the courts below decided it.

But if the question is to be taken up for decision by this Court the answer depends upon whether or not the principle of the *Belo* case is to stand.

The principle of the contract in each case is the same. In *Belo* it was a contract to pay a stipulated rate per hour for straight time, one and a half times that for overtime, with a guaranty of a sum not less than a stipulated total. Here, it was a contract to pay a stipulated rate per hour for straight time, one and a half times that for overtime, with a guaranty of a sum not less than a stipulated total arrived at by the simple arithmetic of multiplying the amount of lumber stacked by an agreed amount per thousand board feet.

The purpose of the contract in the *Belo* case was to provide the employees with a minimum amount based on an agreed hourly rate and to enable them to have at least a definite minimum total pay each week. The similar purpose here was also to provide the employees with a minimum amount based on an agreed hourly rate and to enable them to increase that amount by

receiving additional pay based on the amount of their effort.

The controversy here, as in the *Belo* case, centers about the question whether the "regular rate" should be computed from the guaranteed or total weekly wage or whether it should be identical with the hourly rate set forth in the employment contract. The point has been decided adversely to petitioner in the *Belo* case. It is doubtless again raised now with the hope that a change in the personnel of the Court might mean a change in the principles announced by the Court. But this should not be if ours is to continue to have some semblance of being a government of laws rather than of men.

It is charged in the petition that the contracts did not alter the character of the piece rate basis but were intended to preserve it. The employer here was on the piece rate basis before the Act. If it be contended that the contracts are bad because they permit the same total weekly wage as before the Act, the answer is to be found in the statement in the *Belo* case:

> "It is no doubt true, as petitioner contends, that the purpose of respondent's arrangement with its employees was to permit as far as possible the payment of the same total weekly wage after the Act as before. But nothing in the Act bars an employer from contracting with his employees to pay them the same wages that they received previously, so long as the new rate equals or exceeds the minimum required by the Act."

The arguments advanced by petitioner here are almost identical to those in the *Belo* case which actually boil down to the contention that parties cannot by contract agree upon what is to be the regular hourly rate. But in the *Belo* case the court wrote:

"But it is agreed that as a matter of law employer and employee may establish the 'regular rate' by contract."

The contracts here provide that the workers shall be paid for their *time*, those *hours* worked, on the basis promulgated as a minimum by petitioner for the lumber industry with time and a half for any overtime *hours* they might work. They would get this hourly rate regardless of how *slow* they might work. The Act, which appears to be applicable mainly to the *time* element, is therefore satisfied. In addition to pay for their *time* the employees get paid for their *effort*. This amount is measured by the amount of lumber stacked.

The contracts here while complying with the spirit as well as the letter of the law in providing for pay for the workers' *time*, go further and provide a reward for *effort* by stipulating for a total pay of not less than a sum based on the amount of lumber stacked. But in no event, no matter how little the effort, or how little lumber they might stack, the employees are nevertheless to be paid for their *hours* including overtime hours.

Here, as in the *Belo* case, was an example of a "special problem" because just as the employees there wanted a regular weekly income, the employees here wanted a system under which by increased effort, even during the straight overtime hours, they could make more money. They were actually not willing to work on any other basis.

Here a contract had been signed by the employer as in the *Belo* case and in adition the employees, too, had signed. They had agreed in writing what was really understood all along and that was that they were

---

So found by the trial court, see paragraph 6, R. p. 95.

to get at least the minimum under the Act for their hours and more for their effort. What was said about employment contracts in the *Belo* case applies also in principle here:

> "When employer and employees have agreed upon an arrangement which has proven mutually satisfactory, we should not upset it and approve an inflexible and artificial interpretation of the Act which finds no support in its text and which as a practical matter eliminates the possibility of steady income to employees with irregular hours."
>
> "This policy is based upon a common sense recognition of the special problems confronting employer and employee in businesses where the work hours fluctuate from week to week and from day to day."

It would be necessary for the Court to overrule the *Belo* case in order to hold the contracts here invalid. But the rule of *stare decisis* would suggest that the established law be left settled in order that parties may know what the law is and govern themselves accordingly.

*Walling vs. Helmerich & Payne, Inc.*, 89 L. ed. 1, is cited by petitioner as controlling here. To be controlling it should be similar either in its facts or its principle. It is neither. There the employer was paying $87.00 for an eight hour shift or tour (or 87½c per hour) prior to the Act. After the Act and under a new contract the pay was to be 70c for the first four hours of each eight hour shift or tour as the "regular rate" and one and one half times that amount or $1.05 per hour for the other four hours, characterized as "overtime." Thus each eight hour shift would involve both "regular pay" and "overtime pay." No room for application was given to the provision of the Act for

overtime pay after forty hours. This is called the "split day" plan.

Here there was a completely orthodox agreement for straight time hourly pay and overtime hourly pay plus an agreement to reward incentive by paying for results produced.

In one, a disregard of overtime hours, in the other an express provision for payment for overtime hours.

The case cited is not analagous for the further reason that it involves no guaranty as in the case at bar. The case cited does not overrule the *Belo* case on which the contracts are based but distinguishes it by showing that the *Belo* case involved a different question (headnote 6) namely, whether the regular rate should be computed from the guaranteed weekly wage or whether it should be the regular rate agreed on in the contract.

Furthermore, the split day plan is condemned by the court as involving "ingenious mathematical minipulations" and as being "unrealistic and artificial" and as "fictitious." On the contrary in the case at bar counsel for appellant in the brief on original submission in the Circuit Court of Appeals (p. 18) have admitted that the contracts in the case at bar were "made in good faith."

The *Helmerich* case is not similar in its facts or its principle and is in no way controlling here. The fact that this Court distinguished the case on its facts from the *Belo* case in a sense reaffirmed its principle.

It is difficult to see the basis in the record for the charge (p. 6) that the Circuit Court of Appeals "permitted a clear evasion of the Act to stand" or the charge (p. 7) "the purpose and effect of respondent's contracts were to circumvent the overtime provision of the Act," or that the rate fixed by the contract was "artificial, fictitious" in the face of the fact that these were common

unskilled laborers whose rate, as the minimum, had been fixed by petitioner's own promulgation, or in the face of the conclusion by the trial court (R. 97) that "there was no intention to disregard or evade the law." Nor is it easy to see the consistency of the implication of bad faith in the present petition with the admissions of good faith on respondent's part contained in the brief for petitioner in the court below (p. 3, p. 18).

## CONCLUSION

Briefly stated respondent's position is that the only question for decision in the trial court was whether it was necessary to enjoin respondent from future violation of the Act. The trial court in the exercise of its discretion (Hecht case) denied the injunction and no claim is made here that in so doing it abused its discretion. Its conclusion could be justified equally well either on the ground that the piece rate pay system complained of had been abandoned or that there had been so comparatively few overtime weeks in the past that there was little likelihood of any in the future.

The validity of the employment contracts entered into before the trial comes into question only if overtime hours should thereafter be worked but with no justification of the court assuming that there would be any overtime work.

If the validity of the employment contracts is to be considered they are governed by the *Belo* case and not by the *Helmerich* case.

For the foregoing reasons the writ should be denied.

FRED S. BALL, JR.,
*Attorney for Respondent.*

March 1945.

# APPENDIX
## COPY OF EMPLOYMENT CONTRACT

Whereas, the undersigned employee of Youngerman-Reynolds Hardwood Company, hereinafter called the company, has been working as a stacker for the company for some time and the work was done on a piece-work basis of the fact that said employee was not willing to work on an hourly basis; and

Whereas, the piece-work basis was understood both by the employee and the company to include additional compensation for any overtime hours worked; and the employee has been fully paid all amounts due him up to the last pay day and the parties desire to put in writing the agreement which has at all times been understood between them;

Now, therefore, it is agreed between the company and the employee that the agreement as to the basis of pay is as follows:

The basic or regular rate of pay is 35c per hour for the first forty hours each week and for time over forty hours each week the pay shall not be less than one and one-half times such basic or regular rate above mentioned with a guaranty that the employee shall receive weekly for regular time and for such overtime as the employee may work a sum arrived at as follows:

The amount of stacking done by said employee shall be figured on the basis of 80c per thousand board feet of lumber for flat stacking and 70c per thousand board feet for lumber racked.

In witness whereof, the parties have entered into this agreement in this 21 day of September 1943.

YOUNGERMAN-REYNOLDS HARDWOOD COMPANY,
By G. C. Youngerman, Employer,
*As its President.*

JOHN (his X Mark) TAYLOR, *Employee.*

Witness:
J. B. LOGAN
J. L. WILLETTE

FILE COPY

Supreme Court, U. S.
FILED
APR 30 1945
CHARLES ELMORE CROPLEY
CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 955

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

YOUNGERMAN-REYNOLDS HARDWOOD COMPANY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

## BRIEF FOR THE RESPONDENT.

THE PARAGON PRESS, MONTGOMERY

# INDEX


| | Page |
|---|---|
| Opinions below | 1 |
| Questions presented | 2 |
| Statement | 2 |
| Violations charged | 2 |
| Two classes of workers | 3 |
| Three inspections | 4 |
| The employment contracts | 5 |
| Findings by the district court | 7 |
| Argument | 8 |
| There was no abuse of discretion | 8 |
| Conclusion | 32 |


## CITATIONS


| | |
|---|---|
| *Walling v. Belo Corp.*, 316 U. S. 624 | 6 |
| *Hecht Company v. Bowles*, 321 U. S. | 9 |
| *Petroleum Exploration v. Public Service, Co.*, 304 U. S. 209, 218 | 9 |
| *Harrisonville v. Dickey*, 289 U. S. 324 at 337, 338 | 9 |
| *Truly vs. Wanzer*, et al., 5 How. 142 | 9 |
| *Fleming v. Hoerman, d. b. a. Lyndon Broom Co.*, (DC Kan.; 1942) 6 Labor Cases Sec. 61283 | 11 |
| *Fleming v. National Bank of Commerce of Charleston* (W. Va.; 1941) 41 Fed. Supp. 883 | 11 |

## CITATIONS


Page

*Walling v. T. Buettner and Co.*, (CCA-7; 1943) 6 Labor Cases Sec. 61,445, February 11, 1943 ..... 11

*Walling v. John J. Casale, Inc.*, (DC N. Y.; 1943) 6 Labor Cases Sec. 61,524, March 26, 1943 ..... 11

*Fleming v. W. E. Lipshutz d. b. a. Monarch Co.*, (DC Ga.; 1943) 6 Labor Cases Sec. 61,490, February 12, 1943 ..... 11

*Walling v. Emery Wholesale Corp.*, (DC Ga.; 1943) Affirmed 138 F (2) 548 ..... 11

*Walling v. W. B. Pine*, (DC Okla.; 1942) 6 Labor Cases Sec. 61,189, June 24, 1942 ..... 11

*Fleming v. Phipps*, 35 F. Supp. 627 ..... 11

*U. S. vs. Rosenwasser*, 323 U. S. 360 ..... 11

*Atlantic Co. v. Walling*, 131 F 2, 518 (CCA 5 1942) ..... 23

*Shipler v. Crucible Fuel Company*, (DC Pa. 1943) 6 Labor Cases, Sec. 61,444 ..... 23

*Walling v. Helmerich & Payne*, 323 U. S. 37, 89 L. ed. 1 ..... 2

*Overnight Motor Transportation Company v. Missel*, 316 U. S. 572, 89 L. ed. 1682 ..... 26

*International Register Company v. Recording Fair Register Company*, 151 Fed. 199 ..... 31

# In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 933

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

YOUNGERMAN-REYNOLDS HARDWOOD COMPANY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

## BRIEF FOR THE RESPONDENT.

## OPINIONS BELOW

The findings of fact, the opinion, conclusions of law and the judgment of the District Court denying the petition for injunction and dismissing the case appear in the record from pages 94 to 97.

The opinion of the Circuit Court of Appeals for the Fifth Circuit affirming the District Court appears in the record from pages 125 to 127. The opinion is reported at 145 F. (2); 349.

## QUESTION PRESENTED

The only question presented by this record is whether the trial court abused its discretion in denying the petition for an order enjoining the defendant from future violations of the Fair Labor Standards Act.

## STATEMENT

The plaintiff below, petitioner here, brought an action in the district court seeking an order enjoining the defendant, a company engaged in operating a lumber mill at Samson, Alabama, from future violation of certain provisions of the Fair Labor Standards Act (hereinafter referred to merely as the Act). The complaint was filed March 17, 1943. (R. 7).

### *Violations charged*

The complaint charged the defendant with three violations of the Act; first, with reference to shipment of goods produced by certain suppliers where they, not the defendant, violated the act; second, the failure to keep proper records; and third, the payment of wages by the defendant in violation of sections relating to overtime.

At the beginning of the trial the plaintiff withdrew the charge with reference to the shipment of goods produced by suppliers, (R. 10) thus eliminating the first of these charges.

The district court found as a fact (R. 93): "There is not sufficient evidence that the defendant intentionally failed to keep adequate records." The petitioner makes no contention here in brief to the contrary. This would, therefore, seem to eliminate from the case the second of these charges.

This leaves only the charge with reference to overtime.

*Two classes of workers*

The mill had two classes of work. One was the mill work done on an hourly basis. All hourly paid mill workers were without dispute fully paid for all overtime. The other was the work of stacking lumber. Lumber stacking is common labor. It consists of the simple unskilled work of picking up boards and placing them in a stack. The custom in the lumber industry is to pay the stackers on a piece rate basis. Although common laborers, they make considerably more than other common laborers working on an hourly basis. For the most part they work independently of the other operations of the mill. The system is described by Youngerman, president of the defendant company, at page 78 of the record. The lumber goes through the mill and then to the green chain where hourly paid men take the lumber off, sort it and put it on various wagons or lumber dollies which are then moved away by hourly paid men to a place where the stacking is to be done. At that point hourly paid employees remove the lumber from the dollies and leave the lumber in separate piles. At this point the work of the hourly paid employees ceases and from that point on the stackers take over. They usually work on a piece rate basis of an agreed amount for each thousand of board feet stacked.

The stackers go to work when they choose, work as long as they want to, and stop when they get ready. Some of them start early in the morning before the mill starts and work in the cool of the morning. Later in the day when it gets hot they will often quit and come back later to do more stacking in the cooler afternoon hours. They quit work when it rains and virtually work when

and as they please. Although they are common laborers the nature of their work is such that they work without supervision and at such hours as they see fit.

When there is no stacking to be done, the stackers often work in the mill and are then paid on an hourly basis. The rate actually paid the stackers for mill work was, with some later exceptions, 35c an hour with one and a half times that amount for overtime. (Plaintiff's exhibit 1, R. 115-121).

*Three inspections*

Prior to the effective date of the Act the defendant company had been employing the stackers on the piece rate basis and continued to do so afterwards except during the year 1940 when they were put on an hourly basis and were paid time and a half for overtime but they became dissatisfied with this arrangement, threatened to quit and were changed back to the piece rate basis. (Finding 6, R. 95).

The company was inspected by representatives of the administrator on three occasions. In 1940 there was an inspection at which time the question of the piece rate pay basis arose and the inspectors told the company's president, Youngerman, that his piece rate pay system was all-right (R. 72). In 1941 there was a second inspection and again the inspectors told Youngerman his piece rate basis was satisfactory (R. 74). In the fall of 1942 there was a third inspection and it was then for the first time that Youngerman was told that his piece rate basis of paying stackers without extra pay for overtime hours was a violation of the law. (Finding 7, R. 95). There was then an abrupt end of overtime (R. 117) (Finding 7, R. 95) and from then on until the suit was

filed in March 1943 there was, with one minor exception,[1] no more overtime.[2]

When the suit was filed in March 1943 the *Rosenwasser* case had not been decided and the law had not been settled with reference to piece rate pay. This case was pending in court and the rights of all parties could be protected. The government was urgently calling for more lumber production in connection with the war effort and the company thereupon permitted the stackers to begin working overtime. But the amount paid, although figured on the piece rate basis, was paid not as final payment but as an advance. The books were held in suspense so that if it should be held that the company owed any additional amount for overtime it could be paid. (Finding 9; R. 96). These payments were thus handled on advice of counsel and in utmost good faith. The petitioner has conceded this fact.[3] That there was nothing objectionable about this *pendente lite* arrangement is indicated by the fact that although half a year elapsed between the filing of the suit and the date of trial petitioner made no effort to obtain a temporary restraining order against it.

### *The employment contracts*

There were several pre-trial conferences (R. 9) at which petitioner's counsel insisted that the piece rate basis of pay without additional pay on an hourly basis for overtime hours was a violation of Section 7. The

---

1 Clifton Holmes worked *one* hour overtime during the week ending October 10, 1942.

2 The 44 hours worked for the week ending October 31, 1942, by Clifton Holmes was four hours of overtime but was for mill work and was paid on an hourly basis with full overtime pay. (R. 117). The same is true of the 44 1/2 hour week of February 20, 1943, worked by Lorenza Poon, which was likewise paid on an hourly basis and overtime fully paid. (Plaintiff's exhibit 1, R. 115).

3 It is admitted in petitioner's brief (p. 3) on the original submission in the Circuit Court of Appeals that "These steps were taken in good faith and on advice of counsel."

defendant company would gladly have put them back on an hourly basis but the stackers were not willing to work on an hourly basis. In an effort to satisfy the requirements of the statute and also the wishes of the workers a plan was developed, on advice of counsel based upon the plan approved in the Belo case,[4] which provided for pay for overtime hours on an hourly basis at the rate at which they had been usually paid when doing work other than stacking (35c) and which at the same time gave the stackers an opportunity to earn even more than that amount by increased effort under a guaranty figured on a piece rate. Contracts were entered into with the three remaining stackers after being read and fully explained to them. The contracts provided as follows:

> "The basis or regular rate of pay is 35c per hour for the first forty hours each week and for time over forty hours each week the pay shall not be less than one and one-half times such basic or regular rate above mentioned with a guaranty that the employee shall receive weekly for regular time and for such overtime as the employee may work a sum arrived at as follows:
>
> "The amount of stacking done by said employee shall be figured on the basis of 80c per thousand board feet of lumber for flat stacking and 70c per thousand board feet of lumber racked." (R. 108).

The 35c rate specified was the minimum hourly rate promulgated by the petitioner for the lumber industry in November 1941 (R. 14) and was also the rate usually paid when they were doing work other than stacking. (R. 115-121).

---

4 *Walling v. Belo Corp.*, 316 U. S. 624.

*Findings by the district court*

The trial court found as a fact that

"The defendant in this case did not intentionally violate the law with reference to its stackers . . ." Finding 8; R. 96).

The district court stated:

"This court is aware of the fact that it is no proper function of a court to pass on the wisdom or lack of wisdom of any valid enactment of a law, and that it is the duty of the court when its processes are invoked to give effect to the law as it finds it to be. But at the same time where the injunctive power of the court is sought to be invoked there should be clear proof of an intentional purpose to circumvent or evade the law and unwillingness to conform to the law. The administrative agency of the government in administering the wage and hour law would make it more effective by showing employers how to observe the law and by helping them to interpret and understand the law where its provisions are not clear rather than by invoking the injunctive powers of the court in cases where there is no intention to disregard or evade the law.

"The individuals operating the defendant corporation in this case are laymen and are not skilled in interpreting and construing new laws. They no doubt reached the conclusion that under their arrangement with the lumber stackers they were paid wages which amounted to as much as or more than the minimum wage prescribed in the act with time and a half paid for all overtime and that as this arrangement was satisfactory to both the employer and the employee that they were acting

within the spirit and intention of the law that they were not required to pay any additional amount. In this conclusion, if the construction placed on the act by the administrator and some of the courts is right, the defendant was wrong. But in the opinion of this court it was not such wrong and there was not such intentional violation of the law resulting therefrom as to call for injunctive relief especially where there is evidence, as there is in this case, that the defendant has ceased such practices and has manifested a desire and willingness to fully conform to the provisions of the law."

The court declined to issue the injunction sought and dismissed the suit.

## ARGUMENT

### *There was no abuse of discretion*

The only relief sought by the plaintiff was an order enjoining the defendant from future violation of the Act.

Section 17 of the Act provides: "The district court . . . shall have jurisdiction *for cause shown* to restrain violation . . ." (emphasis supplied).

Rule 52 of the Rules of Civil Procedure provides:

> "In all actions tried upon the facts without a jury, the court shall find the facts specially and state separately conclusions of law thereof . . . Findings of fact shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. . . ."

Except where a statute gives an absolute right, the granting or refusing of an injunction rests in the sound



discretion of the court.[5]

The power of courts to issue injunctions should be exercised sparingly and with great caution.[6]

These principles are recognized in the recent case of *Hecht Company vs. Bowles*, 321 U. S. 321, (decided February 28, 1944). There the Administrator under the Emergency Price Control Act of 1942 sought an injunction against a department store under Section 205 (a) of that Act which provided that "Upon a showing . . . a permanent or temporary injunction . . . shall be granted," to restrain violation of that act.

The question was stated by the court to be:

> "The question in this case is whether the Administrator, having established that a defendant has engaged in acts or practices violative of Section 4 of the Act entitled as of right to an injunction restraining the defendant from engaging in such acts or practices or whether the court has some discretion to grant or withhold such relief."

In that case the district court had found that the "mistakes in pricing and listing were all made in good faith and without intent to violate the regulations." It declined to issue the injunction and dismissed the case. On appeal, the Circuit Court of Appeals construed the Act to require the issuance of an injunction or other order as a matter of course once violations were found. On certiorari this court held that although "the cessation of violations, whether before or after the institution of a suit by the Administrator is no bar to the issuance of an injunction," that nevertheless the

---

5 *Petroleum Exploration vs. Public Service Co.*, 304 U. S. 209, 218. *Harrisonville vs. Dickey*, 289 U. S. 334 at 337, 338.

6 "There is no power, the exercise of which is more delicate, which requires greater caution, deliberation, and sound discretion, or more dangerous in a doubtful case, than the issuing an injunction." *Truly vs. Wanzer, et al.*, 5 How. 142.

court did "not think that under all circumstances the court must issue the injunction or other order which the Administrator seeks." This court held that ". . . if Congress had intended to make such a drastic departure from the traditions of equity practice an unequivocal statement of its purpose would have been made."

In discussing the general rules with reference to the injunctive processes of equity court, this court wrote as follows:

> "We are dealing here with the requirements of equity practice with a background of several hundred years of history. Only the other day we stated, that 'An appeal to the equity jurisdiction conferred on federal district courts is an appeal to the sound discretion which guides the determinations of courts of equity.' Meredith v. Winter Haven, 320 U. S. 228, 235, ante, 1, 4, 64 S. Ct. 7. The historic injunctive process was designed to deter, not to punish. The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mold each degree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjudgment and reconciliation between the public interest and private needs as well as between competing private claims."

The Court of Appeals was reversed and the case was remanded so that the Circuit Court of Appeals could determine whether the district court had abused its discretion in dismissing the complaint.

The principle there stated governs the case at bar. In that case, the defendant in good faith and unin-

tentionally had violated the provisions of a federal statute. Here, in 1942, prior to the inspection in the fall, the defendant company had worked the stackers some overtime weeks without additional pay for overtime hours and under the construction of the statute as eventually decided in the *Rosenwasser** case this was a violation of a federal statute but it had been done without intention to violate the law. There this court said that there was "no doubt . . . of the petitioner's good faith . . ." Here the district court found that "the defendant in this case did not intentionally violate the law . . ."

Among the cases where there had been unintentional violations of the act here involved and the courts have held no injunction necessary are:

*Fleming v. Hoerman, d. b. a. Lyndon Broom Co.*, (DC Kan.; 1942) 6 Labor Cases Sec. 61283,

*Fleming v. National Bank of Commerce of Charleston*, (DC, W. Va.; 1943) 41 Fed. Supp. 833,

*Walling v. T. Buettner and Co.*, (CCA-7; 1943) 6 Labor Cases Sec. 61, 445, February 11, 1943,

*Walling v. John J. Casale, Inc.*, (DC N. Y.; 1943) 6 Labor Cases Sec. 61,524, March 26, 1943,

*Fleming v. W. E. Lipshutz, d. b. a. Monarch Co.*, (DC Ga.; 1943) 6 Labor Cases Sec. 61,490, February 12, 1943.

*Walling v. Emery Wholesale Corp.*, (DC, Ga.; 1943) Affirmed 138 F (2) 548,

*Walling v. W. B. Pine*, (DC, Okla.; 1942) 6 Labor Cases Sec. 61,189, June 24, 1942,

*Fleming v. Phipps*, 35 F. Supp. 627.

---

* *U. S. vs. Rosenwasser*, 323 U. S. 360

The absence of any intention to evade the minimum wage requirements of the Act was clearly shown by the fact that the defendant company had at all times paid its stackers far in excess of the minimum. (See comparison, defendant's Exhibit 1, R. 106).

That the defendant company was not resorting to the piece rate basis of pay to avoid the overtime provision is shown by the fact that it was the stackers and not the company, who were insisting upon working on the piece rate basis and who were unwilling to work on an hourly basis.

Its good faith was indicated by the fact that the company although working the stackers on a piece rate basis where the pay was figured not by the hour but by the amount of lumber stacked had nevertheless, in an effort to fully comply with the law, kept an accurate hourly record during all the years since the act went into effect. Although the number of hours did not seem to have any bearing on the pay, the law required a record of hours worked and the company in order to comply did what must have seemed to be a useless thing and kept such a record.

Petitioner's brief indicates a clear misunderstanding of the facts in the case with reference to overtime weeks. The brief (p. 3) contains the following statement of fact:

> "Before the Act became effective and during most of the period thereafter, respondent employed and paid its stackers at agreed piece rates per thousand board feet. Each week it paid the same piece rates during overtime hours as during non-overtime hours of work. Thus, respondent made no provision for paying for overtime hours at one and one-half times the regular rate of pay as required by Section 7 (R. 95-96, fdgs. 6-7, 9)."

This statement would lead the court to believe that *during most of the period*, and each week thereof, since the Act became effective in 1938 that the company was working its stackers overtime hours without overtime pay. But that is not true. No evidence was offered by petitioner as to 1938 or 1939 but evidence was offfor the years 1940, 1941, 1942 and 1943 to trial date.[7] Petitioner *agreed* by stipulation (R. 113) that

> "... *during most of the year* 1940 *the stackers were ... put on an hourly basis and were paid time and a half for all overtime worked.*"
>
> (The district court so found. Finding 6, R. 95).

Petitioner further *agreed* by stipulation:

> "... *that during* 1941 *from January to May the stackers were not worked any overtime and from May to the end of the year there was little, if any, overtime worked.*"

The district court likewise so found. (Finding 7, R. 95). The district court also found that in 1942 prior to notification, out of 234 man weeks only 87 were overtime. (Finding 7, R. 95). It also found that from the fall of 1942 until the filing of the suit in March 1943 there was no overtime work. (Finding 7, R. 95, 96).

Petitioner's brief goes on in the next paragraph to state:

> "During 1942 more than one-third of the man-weeks worked involved overtime (R. 95, fdg. 7). In the fall of that year an inspector from the Wage and Hour Division notified respondent that its

---

7 The tabulation of workers' hours and pay (R. 115-121) covers only 1942 and part of 1943 but the stipulation (R. 112) states that records for 1940 and 1941 were in evidence.

> method of employing the stackers violated the overtime requirements of Section 7 (*ibid.*). Respondent, however, did not alter its method of payment but, even after this action was commenced, continued to employ the stackers during overtime hours without compensating them at one and one-half times their regular rate of pay."

The statement that after the negotiations in the fall of 1942 "Respondent, however, did not alter its method of payment . . ." would again indicate that there were overtime weeks without overtime pay but the district court's finding in that respect, referred to immediately above, shows that overtime weeks stopped after the notification in the fall of 1942 and in addition to that petitioner's own Exhibit 1 (R. 115-121) shows no overtime weeks after September 26th of that year except for one isolated instance of one hour of overtime. The statement that the respondent did not alter its method of payment "even after this action was commenced" would indicate that the defendant had been and kept on working its stackers overtime weeks without overtime pay. But actually there had been no overtime weeks (with the one exception noted) during the fall, winter and spring months prior to the date the suit was filed (see plaintiff's Exhibit 1, R. 115-121, and Finding 7, R. 95) and the pay basis after the suit was filed was not found by the court to be a continuation of the former system of piece rate pay (even for non-overtime hours) but was found in effect to be a temporary, *pendente lite* system and that the pay was an advance with the books held in suspense so that if more pay was due it could be paid. (Finding 9, R. 96).

Arguments in a brief based upon statements which are not only in conflict with the finding of facts by

the trial court but are also with the agreed stipulation of facts not likely to be sound.

The court, in exercising its discretion, was not dealing with a case such as is indicated by the two quoted statements of fact in petitioner's brief but with a case where there had been virtually *no overtime piece rate weeks between the time when the Act became effective and the filing of the suit except a relatively few in* 1942 *which had stopped on notification and those few had been because of lack of understanding of a new law and not from intention to violate.* The overtime weeks after the suit was filed were found by the trial court to be on an advance of payment basis and were by admission of petitioner in brief made in good faith.

Therefore, on the facts up to the date the suit was filed and on through the *pendente lite* period and up until just before the contracts were signed on the day before the trial there was nothing up to that point to justify the issuance of an injunction and the sole remaining question is whether the signing of the contracts at that time made it an abuse of discretion for the trial court to decline to issue the injunction.

The circumstances existing at the time should be considered in this connection. The Administrator was insisting that the piece rate system without additional overtime pay figured on an hourly basis was a violation. A shift to the hourly basis would have been entirely satisfactory to the company and would have ended its troubles with the Administrator but the stackers would not work on that basis. They had been put on an hourly basis in 1940 and had threatened to quit unless put back on the piece rate basis. The company was in a position directly between the devil and the deep blue sea. The problem was to try to find a plan which would satisfy the requirements of the Act and be one under which

the stackers would be willing to work. The contracts were an effort to accomplish that result.

Section 7 of the Act provides in substance as follows:

> "No employer shall . . . employ any of his employees . . . for a work week longer than forty *hours* . . . unless such employee receives compensation for his employment in excess of the *hours* above specified at a rate not less than one and one-half times the regular rate at which he has been employed. (Emphasis supplied).

The general purpose of the Act was generally thought to be mainly to remove sweatshop conditions. Section 2 of the Act states: "The Congress hereby finds that the existence . . . of labor condtions detrimental to the maintenance of the *minimum standard of living* necessary for health, efficiency and general well-being of workers causes, etc." (Emphasis supplied). Section b declares the policy to be "to eliminate the conditions above referred to . . . without substantially curtailing employment or earning power."

The purpose of the Act is stated in *United States vs. Darby*, 212 U. S. 100, 85 L. ed. 609, to be:

> "The motive and purpose of the present regulations are plainly to make effective the Congressional conception of public policy that interstate commerce should not be made the instrument of competition in the distribution of goods produced under *sub-standard labor conditions*, which competition is injurious to the commerce and to the state from and to which the commerce flows." (Emphasis supplied).

The Administrator had promulgated 35c as the rate in the lumber industry necessary to satisfy the requirements of the Act. This was the rate set out in the con-

tracts. This was the identical rate usually paid them when they were not stacking but were doing other work. Thus the contracts which stipulated 35c as the hourly rate with one and one-half for overtime hours fully complied with the Act.

Are the contracts to be condemned because they enable the worker by increased effort to make even *more* than that necessary to satisfy the Act?

Unquestionably if the company had abandoned the piece rate system and the contracts had provided for a 35c rate with one and a half that for hours over forty each week, and had stopped there with no guaranty they would have completely satisfied the Act. Should they be struck down because, while satisfying the requirements of the Act they go further and provide means by which the worker may, by using the hours to better advantage, take home an even larger pay check?

Without dispute stacking is not skilled work but is common labor. Clifton Holmes, (R. 50) when asked what kind of work he did stated, "Day laborer." Youngerman's testimony that stacking is common labor was not in any way controverted.

Under the contract the stackers *can* by exerting themselves make more than the amount they would on an hourly basis even with one and a half for overtime. Take for example a non-overtime week of forty hours. The hourly pay would be 40 x 35c or $14.00. But under the contract and taking the figure stated in petitioner's brief as the average hourly yield under the piece rate basis as 59c, the stacker by exerting himself under the incentive of piece rate pay would earn for a forty hour week 40 x 59c or $23.60 or more than half again as much as under the hourly basis and this for a *non-overtime* week.

It would seem to the reasonable mind that the con-

tracts providing for the worker's *time* by stipulating a certain amount to be paid to him for each *hour* he is on the job and for one and a half times that rate for each of those hours in excess of forty in each week would fully comply with the letter and the spirit of the Act and that this compliance would not be altered or destroyed by the fact that they also provide a way for the worker by incentive *effort* to earn even more.

No matter how slow they may drag they must in any event, under the contracts, be paid for their *hours* on the job and regardless of how little they do as long as they are kept in employment they are to be paid for their *time*. Whatever more the contract may offer in the way of incentive pay for increased *effort* measured by the amount of lumber stacked, the worker must in any event be paid for his *hours* both non-overtime and overtime on the basis required by the Act.

There is nothing in the Act to prevent an employer from paying *more* than the statutory minimum. Here the contracts provide for the payment of an additional amount not based on *hours*, but based on the amount of lumber stacked. This additional amount over and above the amount paid for their time was for their production. The Act does not prohibit incentive pay. Congress must have known that incentive pay was prevalent in industry and if it had intended to prohibit or even to discourage incentive pay systems appropriate words could have been found to so provide. That Congress did not intend to interfere with incentive systems is indicated by Section 202 b, "It is hereby declared to be the policy . . . to eliminate the conditions above referred to in such industries without substantially curtailing employment *or earning power*." (Emphasis supplied).

The contracts which in fact provide for a regular

rate and for one and one-half that for overtime on a *time* basis and thus fully satisfy the requirements of the Act should not be outlawed because they go even further and enable the workers to be paid for their effort measured by their production.

Although petitioner does not in so many words say that the contracts were made in bad faith, they are characterized as being "elaborate agreements" "signed with a mark" by "illiterate employees."

While the three employees who signed them are not educated men of letters their testimony given in answer to questions put, not by the attorneys, but by the court shows that they understood how they were to be paid under the contract. Clayton Carter did not testify, but the other two did. One of them, John Taylor, who had been working for the company twenty odd years (R. 63) was asked the following questions:

"The court: Well was the contract read to you?

"The witness: Yes, sir, I guess it was.

"The court: Did you think you understood it or not?

"The witness: I understood some of it . . ."

"The court: Well in the conversation yesterday did you understand that you were to get at least 35c an hour?

"The witness: Yes, sir.

"The court: And didn't you understand as to whether you would get more than that if you worked more than the prescribed hours per week?

"The witness: Yes, sir." (R. 64).

However unable to write this stacker may have been he had been working long enough to understand that he was to get at least 35c an hour and more if he worked more than the prescribed hours per week.

The other employee, Clifton Holmes, testified as follows:

"The court: Did you sign a written contract?

"The witness: Yes.

"The court: Was it read to you?

"The witness. Yes.

"The court: Do you think you understood it or not?

"The witness: Yes, sir, I understood some of it. I could not understand all.

"The court: Do you think you understood how you were to get paid?

"The witness: Yes."

Whether these employees signed their names by mark or otherwise would seem to be immaterial in view of the fact that in the *Belo* case the employees did not sign at all and the agreement was in the form of a letter written by the employer to the employees.

The chief criticism leveled at these contracts appears to be that the parties cannot by agreement stipulate the "regular rate" of hourly pay different from an amount arrived at by finding an average of pay for a previous period of time.

The "question presented" according to petitioner is "whether an employer who is in fact paying his employees piece rate yielding earnings of about 39c an hour (which in the footnote is stated to be "the average hourly piece work earnings . . . : calculated from the actual earnings . . . for the weeks in between April 1, 1943 and the date of the trial . . .") is excused from paying additional compensation for overtime calculated upon these earnings by contract which recites that 35c an hour is the "regular rate of pay" and "guarantees" earnings at the piece rate for "regular time and such overtime as the employee may work."

Petitioner charges that the 35c regular rate specified in the contract is "artificial" and "fictitious" and that

the 35c rate is not the regular rate of pay but is merely so "labeled."

Actually what was the regular rate of pay? Was it the average of all stackers for some period selected by petitioner as from April 1, 1943, and the date of the trial in September 1943 or was it the average of all of the employees during some other period or was it the average of each individual employee for some particular period or what was it? What could be more fictitious than a rate of pay arrived at by such a method or what could be more artificial? Under this system neither the employer nor the employee would know what the regular rate of pay would amount to until after enough weeks had been worked by enough workers so that an average could be figured. The employer would not know what amount to pay in a given week until that week and other subsequent weeks had been averaged so as to arrive at the average rate. This predicament was recognized in the *Belo* case when the court with reference to the Administrator's interpretation wrote: "And inasmuch as it cannot be calculated until after the work week has been completed, it is difficult to say that it is "regular" in the sense that either employer or employee knows what it is or can plan of the basis of it."

The statute specifies the overtime rate as "a rate not less than one and one-half times the regular rate at which he is employed." But "regular rate" is not defined in the statute. What was written in the *Belo* case applies here: "The problem presented by this case is difficult—difficult because we are asked to provide a rigid definition of 'regular rate' when Congress has failed to provide one. Presumably Congress refrained from attempting such a definition because the employment relationship to which the act would apply was so

various and unpredictable. And that which it was unwise for Congress to do this court should not do."[8]

In the absence of a definition of "regular rate" in the statute it is reasonable to suppose that Congress intended that parties should, as before, be permitted to agree upon the regular rate of pay.

In the *Belo* case the court wrote:

> "But it is agreed that as a matter of law employer and employee may establish the regular rate by contract."

The dissenting opinion in that case concedes this by stating:

> "The court's interpretation that, in the absence of bad faith, any form of contract which assures the payment of the minimum wage and the required overtime applied with the act may be assumed correct."

The basis of the minority opinion in the *Belo* case appears to be that hourly rates agreed upon there as regular rates were artificial and fictitious as contended for by the Administrator.

The majority of the court in the *Belo* case held that the agreement for the hourly rate with a guarantee of a minimum of $40.00 for the week's work was not artificial.

In the case at bar the agreement of 35c an hour is in no sense "fictitious" or "artificial" because here we have common laborers whose *actual* hourly rate of pay most of the time when they were doing work other than stacking was 35c an hour. This is a fact established by the petitioner's own Exhibit 1 (R. 115).[9]

---

8 *Walling vs. Belo*, 316 U. S. 624, 86 L. ed. 1716.

9 For example, during the week ending March 7, Bob Noye, one of the stackers, did mill work for six hours and was paid six times 35c or $2.10. For the week

How in the face of these facts can it be said that these employees who were paid 35c an hour for one type of common labor in the mill were paid an "artificial" or "fictitious" rate when they agreed to 35c an hour for another type of common labor, namely, stacking?

But petitioner condemns the contracts because the contracts "would enable respondent to pay the specified piece rate uniformly during all *hours* worked, without higher rates for overtime employment." But that is not true. The piece rate basis has no *time* element involved. The piece rate basis involves only pieces of lumber put in place. The 80c for a thousand board feet of lumber flat stacked is, as the words imply, for that much lumber put into a particular position without respect to any time element whatever, and it is in that respect a matter not of counting hours but of counting pieces of wood. When it comes to the matter of counting *hours* the contract specifies how those hours are to be paid for. It is not a question of paying "specified piece rates uniformly during all hours" but a matter of paying for non-overtime hours and for overtime hours on the rates specified plus an additional amount *not* for piece rate *hours* but for piece rate *results* accomplished.

---

ending March 14th another one of the stackers, Rochelle, Lamar, doing work in the mill was paid 35c an hour, both for that week and the following week, and again during the week ending March 28th. (R. 115). Then again (R. 116) Joe B. Hauser and Rochelle Lamar are shown to have worked doing mill work at 35c an hour. Joe B. Hauser is shown during the weeks ending June 20th and June 28th as doing work not indicated as mill work at 35c per hour. Record page 117 shows Eugene Cole doing mill work during the week ending October 10th at 35c an hour and likewise the week ending October 17th. It also shows John Taylor and Clifton Holmes doing mill work during the week ending October 31st and received 35c per hour for their work. Again (R. 118) the tabulation shows Lorenza Poon during the week ending December 5th being paid 35c per hour, and the same applies to Jan Hauser for the week ending December 5th as well as for the week ending Decembr 26th and Lorenza Poon again for the week ending December 19th and December 26th, being paid on the basis of 35c an hour. The same is true on into 1943.

The facts here make even a stronger case than in the *Belo* case. There it was a contract to pay a stipulated rate per hour for straight time and one and a half that amount for overtime with a guarantee of not less than $40.00 a week. Here it was a contract to pay a stipulated rate per hour for straight time, one and a half times that amount for overtime, with a guarantee of a sum not less than a stipulated total arrived at by multiplying the amount of lumber stacked by an agreed amount for a thousand board feet.

Certainly if an employer can agree with his employees for a specified hourly rate of pay for one and a half times that amount for overtime hours and a guarantee of at least $40.00 for a week, and be in compliance with the overtime provision of the Act, then surely an employer who makes the same agreement with reference to hours and overtime hours but who agrees to pay an additional amount based on the number of board feet stacked is all the more in compliance especially where the hourly rate instead of being arrived at by dividing the guaranteed weekly amount of $40.00 by 60, as in the *Belo* case, specifies as the "regular rate" the actual hourly rate which those identical employees receive when they cease one kind of common labor, namely, stacking, and do some other kind of common labor all at the same mill.

What the court was holding in the *Belo* case was that the parties are permitted in good faith to agree as to the *hourly* rate and having done so with the provision for one and a half that rate for overtime the employer is allowed to pay even more than that amount without violating the Act.

The difference between the majority and minority opinions in the *Belo* case actually is that the majority were willing to accept the arrangement as made in good

faith in order to comply with the Act, while the minority were unwilling to accept it.

The principle of the *Belo* decision written by a member of the Court who has gained even additional honor and distinction in his further service to the nation in a critical period, and which has been followed in any number of cases, and affirmed by inference in the *Helmerich*[10] case should not be discarded or overruled.

There would be far more justification for contending that the hourly rate was "artificial" or "fictitious" where it was arrived at by the arbitrary method of dividing the guaranteed weekly wage by 60, as was done in the Belo case than in the instant case where no such method was used but the specified hourly rate was the actual hourly rate paid to those identical individuals when they were not stacking but doing other work around the mill.

In *Atlantic Co. v. Walling*, 131 F2 518 (CCA 5, 1942) the court wrote:

> "The Belo case, however, made it equally clear that where there was a definite and fixed agreement that the compensation was being paid under, and in accordance with, the act, and there was an apportionment of it between base pay and overtime, it was to write, and not to construe, the statute, to hold that the parties had not done what they had agreed they were doing, establish a regular weekly rate and a rate for overtime of at least one and one-half times that rate."

In *Shipler v. Crucible Fuel Company*, (DC Pa. 1943) 6 Labor Cases, Sec. 61,444, an employer adjusted his compensation to meet the minimum require-

10 *Walling v. Helmerich & Payne*, 323 U. S. 37, 89 L. ed. 1

ments of the act by computing former monthly salaries on an hourly basis and contracts of employment providing for a specified regular rate of base pay were signed. The court cited the Belo case and held that "Under the Fair Labor Standards Act, the parties may legally agree upon the regular rate to be paid by the employer to the employee, so long as that rate equals, or exceeds, the minimum required by the Act."

In *Walling v. Emery Wholesale Corporation*, (DC, Ga., 1943) 49 F. Supp. 192 Affirmed 138 F (2) 548, it was held that employment contracts which provided for payment of an hourly rate equal to the statutory minimum, one and one-half times the hourly rate for hours worked in excess of the statutory minimum, and a gratuitous bonus to assure employees of receiving the same amount as their former weekly salaries in weeks when they did not work enough hours to earn weekly salaries equal to their former salaries, and employment contracts which provided for payment of an hourly rate higher than the statutory minimum, one and one-half times that rate for hours worked in excess of the statutory maximum, and stipulated weekly advances equal to the employees' former salaries because of the weekly variance in compensation due to irregular hours, were in compliance with the Act.

These cases support the proposition that the parties may legally agree as to what shall be the "regular rate."

The Missel case[1] cited by petitioner has no application here because there it was a simple case of a fixed weekly wage with no hourly rates specified and, therefore, no provision for the multiplication of the hourly rate by one and a half for overtime hours.

The *Helmerich* case cited by petitioner has no appli-

[1] *Overnight Motor Transportation Company vs. Missel*, 316 U. S. 572, 89 L. ed. 1682.

cation here because that case involves the payment of a specified amount for an eight hour shift or tour with the arrangement that each of these eight hour shifts would involve both regular pay and overtime pay and left no room for application of the forty hour ceiling specified in the Act. The forty hour ceiling was disregarded in the *Helmerich* case but in the case at bar it is expressly recognized. The *Helmerich* case involving the split day plan is condemned by the court as involving "ingenious mathematical manipulations" and "as being unrealistic and artificial" and "as fictitious." None of this could be said about the contract in the case at bar which uses as a regular rate the actual rate of 35c which the workers were paid when doing work other than stacking work which provides for one and a half times that amount for all hours over forty and the agreement to pay an additional amount based on incentive does not destroy or dissolve the obligation to pay for the time and overtime hours.

The *Helmerich* case is not similar in its facts or in principle and is no way controlling here. The fact that this court distinguished the *Helmerich* case on its facts from the *Belo* case serves to reaffirm the principle of the *Belo* case.

With reference to the contention that the purpose of the contract was to permit the employer to continue to pay on the same piece rate basis as before, what was written in the *Belo* case applies here:

> "It is no doubt true, as petitioner contends, that the purpose of respondent's arrangement with its employees was to permit as far as possible the payment of the same total weekly wage after the Act as before. But nothing in the Act bars an employer from contracting with his employees to pay them the same wages that they received previously.

so long as the new rate equals or exceeds the minimum required by the Act."

"But the guaranty contract in this case carries out the intention of the Congress. It specifies a basic hourly rate of pay and not less than time and a half that rate for every hour of overtime work beyond the maximum hours fixed by the Act."

In the *Belo* case it is also stated as follows:

"When employer and employees have agreed upon an arrangement which has proven mutually satisfactory, we should not upset it and approve an inflexible and artificial interpretation of the Act which finds no support in its text and which as a practical matter eliminates the possibility of steady income to employees with irregular hours."

"This policy is based upon a common sense recognition of the special problems confronting employer and employee in businesses where the work hours fluctuate from week to week and from day to day."

If it was necessary for the District Court to decide whether the contracts conform to the Act it is submitted that they did so conform in providing by agreement for a regular rate, a rate of pay for *hours* which was not in any sense "fictitious" or "artificial" or a mere "label" rate but which was the rate promulgated for the industry and was the rate actually paid these identical individuals when they were doing work other than stacking and in further providing for one and one-half that rate for hours over forty.

Whether the District Court did or did not decide that question it certainly must have considered the contract as *bona fide* because it may be certain that if the court had concluded otherwise it would not have

held that the ". . . defendant has ceased such practices and has manifested a desire and willingness to fully conform to the provisions of the law."

The Circuit Court of Appeals held that under the undisputed facts there was "no necessity for an injunction to prohibit future violations" and while the court does not discuss the contracts the opinion is consistent only with the conclusion that that court considered them as *bona fide*.

The decision of the District Court was justified on the basis that these contracts were a bona fide arrangement entered into under the circumstances existing at the time and that they satisfied both the requirements of the Act and the practical necessities of the case with reference to the unwillingness of the stackers to work on an hourly basis.

Moreover the decision could, if necessary, be fully justified on the basis that the question as to the validity of the contracts would never arise unless there should *in the future* be overtime weeks. Whether or not there would be was a matter of conjecture. The fact that there were some during 1942 before notification would not mean that there would be more. The fact that there were some *pendente lite* under a temporary advance arrangement did not necessarily mean that they would continue. Having been brought into expensive litigation in order to satisfy the stackers' demands for a piece rate basis and having found that piece rate for non-overtime weeks was entirely legal, it might well be assumed that the defendant company would not subject itself to further trouble and expense by future overtime weeks.

The fact that the contracts provided for overtime does not, as contended by petitioner necessarily mean that there will be overtime any more than the fact that

an owner insures his house means that there will be a fire.

The tabulation (R. 120-121) shows that wages in the summer and fall of 1943 were increasing and had already increased to 40c and even 45c in some instances. If the court is to assume that there were later overtime weeks so as to bring the validity of the contracts into question it would be equally fair to assume that the pay based on the hourly rate in many instances exceeded the piece rate pay.

Regardless of what, if anything, the court may hold with reference to these contracts the fact remains without dispute that they were the result of an effort made in utmost good faith to comply with the provisions of a law which was new and which, in this respect, had not been construed by this Court.

Therefore, while taking the position that the contracts, if to be construed at all, should be construed as complying, nevertheless it is submitted that if the court should hold to the contrary, the fact remains that they were made in good faith in an honest effort to comply and even in that event the defendant company should not be stigmatized with an injunction.[12]

Even now, after the statute has been constructed it is not entirely clear just how overtime piece rate hours are to be handled. The only guide announced is that "such other modes must be translated or reduced by computation to an hourly basis for the sole purpose of determining whether statutory requirements have been fulfilled." The court does not say that the total amount of pay, figured on the piece rate basis, must be divided by the total number of hours in order to get the "regular" rate of pay and that one and a half times

12 That an injunction does stigmatize a defendant as a law violator was recognized in *International Register Company vs. Recording Fair Register Company*, 151 Fed. 199

this amount is the overtime rate and certainly it does not say that the overtime rate is one and a half times the piece rate. Even the Administrator is not yet clear as to what the law is as is indicated in the brief on his behalf (brief page 9) where it is stated:

> "The Administrator has never been certain that this second method of payment is in strict compliance with the Act, and the Court's statement in the *Rosenwasser* case (p. 364) that piece work earnings must be reduced to an hourly basis for the purpose of determining compliance would seem to indicate, if read literally, that payment of one and a half times the applicable piece rate for each piece of work done during overtime hours would not constitute compliance with Section 7 if the employee completed fewer hours of work."

Even now, after the *Rosenwasser* case the Administrator himself is not entirely clear as to the law with reference to rate overtime.

Most of petitioner's argument is with reference to the effect of the contracts on overtime pay. The position taken is that an employer who had been paying piece rates which average 59c an hour is not "excused" from thereafter paying overtime based on that average by a contract providing that 55c an hour is to be the regular rate of pay. The parties cannot, therefore, agree to a rate less than the previous piece time average. The statute is thus rewritten so that Section 7 instead of providing that overtime is to be paid "at a rate not less than one and one-half times the regular rate at which he is employed" is to be changed to read, "at a rate not less than one and one-half times the average amount previously paid" or to make a special provision so that the statute with reference to piece rate employees so that

the statute would read, "at a rate not less than one and one-half times the average previously paid on a piece rate basis."

But the statute does not so provide. It does not say anything about any "average." Nothing in the Act indicates that Congress had in mind that overtime rates were to be based on some previous "average" nor is there anything in the Act to indicate that Congress intended to deprive the parties of the free right to contract as long as the amount was not below the minimum.

The policy declared is to correct "conditions detrimental to the maintenance of a minimum standard of living" and the freedom to contract was limited only to the extent stipulated.

The statute provides that overtime is to be calculated on the basis of one and one-half times the "regular rate at which he is employed." It did not say anything about average previous earnings which it might well have done if it had so intended. On the contrary the words used are "the regular rate at which he is employed" not the regular rate at which he had been previously employed or the average previously earned. The words, "at which he is employed" carry with them a recognition of the right to agree to employment rates instead of an intention to freeze the regular rate at an amount not less than a previous average.

Therefore, the answer to the question whether an employer is required to pay overtime compensation based on previous "average" earnings is that the statute does not so provide.

## CONCLUSION

To summarize the argument here:

The entire good faith of the defendant company during the entire period is unquestionably established

by the findings of the district court. These findings are under Rule 52 (adopted by this court under the authority of Congress,) and such finding should not be set aside unless clearly erroneous.

That there were virtually no piece rate overtime weeks during the entire period between the inception date of the Act and the date the suit was filed except a relatively few in 1942 prior to notification is not only found by the district court to be a fact but is substantially what was agreed to be a fact in the stipulation signed on petitioner's behalf by no less than four of his attorneys. (R. 112-114).

The overtime piece rate weeks occuring during the six months intervening between the date the suit was filed and the trial date were found by the district court to be on an advance or temporary, *pendente lite* basis and that this was done in good faith and on advice of counsel has been admitted by petitioner's counsel in a brief filed in the Circuit Court of Appeals.

At the trial date, under the undisputed evidence, the *only* overtime piece rate weeks were those in 1942 before notice which stopped abruptly after the notice, and those handled on an advance basis, *pendente lite*, admittedly in good faith.

That there had, therefore, been relatively few overtime piece rate weeks and that those had been in good faith without intention to violate the Act is too well established for question.

The district court found *as a fact* that ". . . there is no necessity for an injunction to prohibit future violations."

The proof as to overtime piece rate weeks did not show any necessity for the issuance of an injunction to prevent future violations.

As to the future, the contracts served two purposes,

first, to show an end of the piece rate pay system without consideration of overtime hours and second, to show that if in the future there should be overtime hours they would be paid at one and one-half times the agreed hourly rate.

The contracts admittedly are valid under the Act as to non-overtime hours and their validity could come into question only if overtime hours should occur in the future, and that is a matter of pure conjecture insofar as this record is concerned.

If it would be fair for the court to assume that there would be future overtime weeks, it would be equally fair to assume that the generally increasing hourly rate as is reflected in the tabulation here, created many instances where the hourly rate which was already increasing to 40c and even 45c and may well have gone to 50c actually yielded an amount larger than that yielded by the piece rate basis thus adding additional reality to the agreement of the parties as to what should be the "regular rate."

If the validity of the contracts is to be decided by this court, it is submitted that they are valid because:

(1). The contracts specify as the "regular rate" the hourly rate promulgated by the petitioner, the very rate which was in fact in many instances actually paid to the selfsame individuals when doing mill work other than stacking, a rate not "artificial" or "fictitious" or a "label" rate but a rate actually paid as shown by petitioner's own Exhibit 1.

(2). The statute does not require that overtime be paid on the basis of the previous "average" hourly wage as translated from the piece rate basis but, subject to the minimum set out, parties are free to agree as to what shall be the regular hourly wage.

(3). The contracts provide for overtime hourly pay on the basis required by the overtime provisions of the

Act, and having thus complied with the hourly provisions of the Act, the contracts are not invalidated because they go further and provide for an additional amount based not on *hours* but on *effort* measured by the amount of lumber stacked because the Act does not prohibit wages in excess of those required and the declared policy of the Act is not to curtail earning power.

(4). Arrangements similar in principle but actually not as realistic have been approved by this Court in the *Belo* case where it was held in substance that parties can agree on a regular *hourly* rate for overtime and for an additional amount of pay based on a factor other than *hours* and the parties here agreed on a regular hourly rate for overtime and for an additional amount of pay based on a factor other than hours.

It is submitted that the district court acted in the proper exercise of its discretion in denying the injunction and that it should be affirmed.

Respectfully submitted,

FRED S. BALL, JR.,
*Attorney for Respondent.*

April 1943.

# SUPREME COURT OF THE UNITED STATES.

No. 955.—October Term, 1944.

L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, Petitioner,
vs.
Youngerman-Reynolds Hardwood Company, Inc.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[June 4, 1945.]

Mr. Justice Murphy delivered the opinion of the Court.

The respondent corporation manufactures lumber for shipment in interstate commerce, employing various men to pick up and stack boards. Prior to the trial in this case these stackers were compensated at agreed piece rates per thousand board feet ricked or stacked. The Administrator of the Wage and Hour Division of the Department of Labor brought suit to enjoin alleged violations of the overtime and record-keeping provisions of the Fair Labor Standards Act of 1938[1] in connection with these stackers. On the day before the commencement of the trial in the District Court the respondent ceased to use the allegedly illegal mode of piece rate compensation and entered into new and more elaborate wage agreements with the stackers. Following the trial the District Court dismissed the complaint and the Fifth Circuit Court of Appeals affirmed the judgment. 145 F. 2d 349. We granted certiorari because of important questions as to whether the new wage agreements comply with the requirements of Section 7(a) of the Act.

*First.* The District Court found that even though the former piece rate agreements be considered unlawful the respondent had no apparent intention of resuming their use. It also found no willful intention on the part of the respondent to violate the Act and no evidence of any intention of future violations. It therefore felt that there was no necessity for an injunction. While "voluntary discontinuance of an alleged illegal activity does not

[1] 52 Stat. 1060, 29 U. S. C. § 201 *et seq.*

operate to remove a case from the ambit of judicial power." *Walling* v. *Helmerich & Payne*, 323 U. S. 37, 43, it may justify a court's refusal to enjoin future activity of this nature when it is combined with a bona fide intention to comply with the law and not to resume the wrongful acts. Cf. *United States* v. *United States Steel Corp.*, 251 U. S. 417, 445. We cannot say, therefore, that the District Court abused its discretion in refusing to enjoin the abandoned method of wage payments.

At the same time, however, the validity of the new wage agreements was also at stake. These agreements on their face contemplated future hourly payments at regular and overtime rates as well as additional piece rate payments. Since the Administrator's complaint alleged generally that the respondent was violating Sections 7 and 15(a)(2) by employing its stackers on a piece work basis for more than 40 hours a week without compensating them for overtime at one and one-half times the regular rate, the question as to whether the new contracts satisfied Section 7(a) was properly in issue. Upon proof that these new provisions did not comply with Section 7(a) the Administrator was therefore entitled to an injunction absent any recognized mitigating factor. Evidence on this matter was introduced at the trial and the two courts below considered the contracts thoroughly, predicating their judgments in part upon the belief that the agreements did comply with Section 7(a). We accordingly turn to a consideration of that question.

*Second.* For approximately six months immediately preceding the trial the stackers were paid piece rates of 60 cents per thousand board feet ricked and 70 cents per thousand board feet stacked. During this period they earned at these rates an average of 51 cents an hour. Under the new contracts made on the day before the trial, however, they were compensated according to the following provisions:

"The basic or regular rate of pay is 35 cents per hour for the first forty hours each week and for time over forty hours each week the pay shall not be less than one and one-half times such basic or regular rate above mentioned with a guaranty that the employee shall receive weekly for regular time and for such overtime as the employee may work a sum arrived at as follows:

"The amount of stacking done by said employee shall be figured on the basis of 80 cents per thousand board feet of lumber for flat stacking and 70 cents per thousand board feet of lumber ricked."

Using by way of illustration the labor performed and the hours worked during the six-month period preceding the trial, the Administrator points out that under the new guaranteed piece rates of 70 and 80 cents per thousand the stackers would earn an average of about 59 cents an hour for all hours actually worked, including those in excess of the statutory maximum. On the basis of the contract "regular rate" of 35 cents an hour,[2] on the other hand, the excess hours would yield the stackers only 52½ cents hourly. It is thus apparent that the guaranteed piece rates would yield greater returns on an hourly basis for both regular and overtime work and that they would actually be the rates paid.

The respondent argues that these contract provisions satisfy Section 7(a) since they provide for a "regular rate" of 35 cents an hour and for payment of one and one-half times that rate, or 52½ cents, for all overtime hours. Inasmuch as the Act does not forbid incentive pay or compensation above and beyond the statutory requirements it is urged that the additional payments resulting from the operation of the guaranteed piece rates are unaffected in any way by Section 7(a). We cannot agree, however, that this scheme of compensation is obedient to this statutory mandate.

Under Section 7(a) an employer is required to compensate his employees for all hours in excess of 40 at not less than one and one-half times the regular rate at which they are employed. Thus by increasing the employer's labor costs by 50% at the end of the 40-hour week and by giving the employees a 50% premium for all excess hours, Section 7(a) achieves its dual purpose of inducing the employer to reduce the hours of work and to employ more men and of compensating the employees for the burden of a long workweek. *Overnight Motor Co.* v. *Missel*, 316 U. S. 572, 577-578; *Walling* v. *Helmerich & Payne*, *supra*, 40; *Jewell Ridge Coal Corp.* v. *Local No. 6167*, slip opinion, p. 5 (May 7, 1945).

The keystone of Section 7(a) is the regular rate of compensation. On that depends the amount of overtime payments which are necessary to effectuate the statutory purposes. The proper determination of that rate is therefore of prime importance.

As we have previously noted, the regular rate refers to the hourly rate actually paid the employee for the normal, non-over-

[2] At the time these contracts were made the minimum wage for the timber products industry had been fixed at 35 cents an hour in an order issued by the Administrator.

time workweek for which he is employed. *Walling* v. *Helmerich & Payne, supra,* 40; *United States* v. *Rosenwasser,* 323 U. S. 360, 363. In the case of piece work wages, this regular rate coincides with the hourly rate actually received for all hours worked during the particular workweek, such rate being the quotient of the amount received during the week divided by the number of hours worked. See *Overnight Motor Co.* v. *Missel, supra,* 580. As long as the minimum hourly rates established by Section 6 are respected, the employer and employee are free to establish this regular rate at any point and in any manner they see fit. They may agree to pay compensation according to any time or work measurement they desire. *United States* v. *Rosenwasser, supra.* "But this freedom of contract does not include the right to compute the regular rate in a wholly unrealistic and artificial manner so as to negate the statutory purposes." *Walling* v. *Helmerich & Payne, supra,* 42. The regular rate by its very nature must reflect all payments which the parties have agreed shall be received regularly during the workweek, exclusive of overtime payments. It is not an arbitrary label chosen by the parties; it is an actual fact. Once the parties have decided upon the amount of wages and the mode of payment the determination of the regular rate becomes a matter of mathematical computation, the result of which is unaffected by any designation of a contrary "regular rate" in the wage contracts.

Here it is established that under the new wage agreements the stackers will receive 70 or 80 cents per thousand board feet ricked or stacked. Translated to an hourly basis, this means that they will receive approximately 59 cents per hour for both regular and overtime hours.[3] That amount is guaranteed them under the terms of the contracts and accurately mirrors all payments that they normally will receive from the respondent during the workweek. This 59-cent figure is therefore the average regular rate at which the stackers are employed. The individual regular rate which must be used depends, of course, upon the number of hours worked and the wages received by each stacker during the particular workweek in question. But such a rate is the one that must enter into any calculations of overtime payments due under

[3] This 59-cents an hour average is based upon a six-month study of work actually done by the stackers and there is no substantial basis for assuming that it is incorrect or that the average is likely to vary appreciably in the future.

Section 7(a). Insofar as the wage agreements failed to provide for the payment of one and one-half times this regular rate for all overtime hours they plainly violated the requirements of Section 7(a).

The 35-cent per hour "regular rate" fixed by the contracts is obviously an artificial one, however bona fide it may have been in origin. Except in the extremely unlikely situation of the piece work wages falling below a 35-cent per hour figure, this "regular rate" is never actually paid. In the normal case where the stackers earn more than 35 cents per hour on the piece rate basis during non-overtime hours, they are guaranteed this higher figure and are actually so compensated. And even when the stackers work overtime they actually receive at the present time an average of 59 cents an hour under the guaranteed piece rate system rather than one and one-half times the 35-cent "regular rate."

The 35-cent figure thus does not constitute the hourly rate actually paid for the normal, non-overtime workweek. Nor is it used as the basis for calculating the compensation received for overtime labor. It is not in fact the regular rate under any normal circumstances. And reliance upon it to prove compliance with Section 7(a) only allows respondent to escape completely the burden of a 50% premium for the hours so worked and prevents the stackers from receiving the benefits of such a premium as Congress intended. Thus by a mere label respondent would be enabled to nullify all the purposes for which Section 7(a) was created. We are unable to perceive any reason for sanctioning that result.

This Court's decision in *Walling* v. *Belo Corp.*, 316 U. S. 624, lends no support to respondent's position. The particular wage agreements there involved were upheld because it was felt that in fixing a rate of 67 cents an hour the contracts did in fact set the actual regular rate at which the workers were employed. The case is no authority, however, for the proposition that the regular rate may be fixed by contract at a point completely unrelated to the payments actually and normally received each week by the employees.

The judgment of the court below is reversed with directions to remand the case to the District Court for further proceedings consistent with this opinion.

*Reversed.*

# SUPREME COURT OF THE UNITED STATES.

No. 956—October Term, 1944.

| | |
|---|---|
| L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, Petitioner, *vs.* Harnischfeger Corporation. | On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit. |

[June 4, 1945.]

Mr. Justice Murphy delivered the opinion of the Court.

Here, as in *Walling* v. *Youngerman-Reynolds Hardwood Co.*, decided this day, we are concerned with the problem of whether a particular type of wage agreement meets the requirements of Section 7(a) of the Fair Labor Standards Act of 1938.[1]

Respondent is a Wisconsin corporation engaged in producing electrical products for interstate commerce. About one-half of respondent's production employees, called incentive or piece workers, are involved in this case.

As a result of collective bargaining by their union, these employees entered into a collective agreement with respondent whereby they are each paid a basic hourly rate plus an "incentive bonus" or "piecework earnings". The various jobs performed by these incentive workers are "time studied" by the management. The time which the job is shown to consume is multiplied by a "standard earning rate"[2] per unit of time. The amount so obtained is known as the "price" placed on that job. When an employee is given work on a job that has been so priced, he receives a job card bearing the price.

The worker is paid his agreed base or hourly rate (ranging from 55 cents to $1.05 per hour) for the time which he takes to perform the job. If the job price exceeds this base pay, he ultimately receives the difference between the two amounts. The excess of the job price over the hourly earnings is known as an "incentive bonus" or "piecework earnings." Thus the sooner a job is completed the greater will be this incentive bonus. When the job price is smaller than the hourly earnings the employee receives only the hourly rate for the time worked, being assured

[1] 52 Stat. 1060, 29 U. S. C. § 201 *et seq.*

[2] The "standard earning rate" is the hourly rate of pay which workers in the Milwaukee, Wisconsin, district receive for that type of work. This "standard earning rate" is not the base rate of any worker in respondent's plant, nor is it the average hourly earned rate of any worker.

of that rate regardless of his efficiency or speed. About 98.5% of the incentive workers, however, work with sufficient efficiency and speed to earn compensation over and above their base pay. These incentive bonuses were found by the District Court to form about 22% of the total compensation received each pay day by these workers, exclusive of overtime payments, although respondent claims that the bonuses vary from 5% to 29% of each payroll.

On many jobs which have not been "time studied" the respondent has agreed to pay, and does pay, each incentive worker an hourly rate at least 20% higher than his basic hourly rate. And when an incentive worker is temporarily assigned to "non-incentive" work he is paid at least 20% more than his basic hourly rate. Moreover, vacation pay is based on an employee's average hourly straight time earnings over a three-month period and not on his base rate.

These incentive workers frequently work in excess of the statutory maximum workweek. For these extra hours they receive a premium of 50% of the basic hourly rate, which does not reflect the incentive bonuses received. Likewise, when incentive workers are working on jobs that have not been "time studied" or are temporarily doing "non-incentive" work they receive overtime pay on the basis of their basic hourly rates rather than on the 20% higher hourly rates actually paid them during the non-overtime hours.

The Administrator of the Wage and Hour Division of the Department of Labor brought this action to compel the respondent to comply with the provisions of Section 7(a) of the Act. In defense, respondent pointed to the provision in the collective contract to the effect that "the parties agree that, for all purposes, the regular rate of pay at which each employee who participates in an incentive plan is employed, is the base rate of each such employee." The District Court held that the respondent was violating the Act by excluding from the computation of overtime the piece rates actually paid. 54 F. Supp. 326. The Seventh Circuit Court of Appeals reversed that judgment by a divided vote. 145 F. 2d 589.

Our attention here is focused upon a determination of the regular rate of compensation at which the incentive workers are employed. To discover that rate, as in the *Youngerman-Reynolds* case, we look not to contract nomenclature but to the actual payments, exclusive of those paid for overtime, which the parties have agreed shall be paid during each workweek.

It is evident that all the incentive workers receive a guaranteed basic hourly pay as a minimum. As to those who receive no regular additional payments during their non-overtime hours the respondent complies fully with Section 7(a) by paying them one and one-half time the basic hourly rate for all overtime hours. But the vast majority of the employees do receive regular though fluctuating amounts for work done during their non-overtime hours in addition to their basic hourly pay.

(1) Those who receive hourly rates at least 20% higher than their guaranteed base rates clearly are paid a regular rate identical with the higher rate and the failure of respondent to pay them for overtime labor on the basis of such a rate is a plain violation of the terms and spirit of Section 7(a). No contract designation of the base rate as the "regular rate" can negative the fact that these employees do in fact regularly receive the higher rate. To compute overtime compensation from the lower and unreceived rate is not only unrealistic but is destructive of the legislative intent. A full 50% increase in labor costs and a full 50% wage premium, which were meant to flow from the operation of Section 7(a), are impossible of achievement under such a computation.

(2) Those who receive incentive bonuses in addition to their guaranteed base pay clearly receive a greater regular rate than the minimum base rate.[3] If they received only piece work wages it is indisputable that the regular rate would be the equivalent of the translation of those wages into an hourly rate. *United States v. Rosenwasser*, 323 U. S. 360. It follows that piece work wages forming only a part of the normal weekly income must also be an ingredient of the statutory regular rate. Piece work wages do not escape the force of Section 7(a) merely because they are paid in addition to a minimum hourly pay guaranteed by contract. Indeed, from another viewpoint, the incentive employees so compensated are in fact paid entirely on a piece work basis with a

[3] This is shown by the following example. An incentive worker is assigned a basic rate of $1 an hour and works 50 hours a week on 15 "time studied" jobs that have each been given a "price" of $5. He completes the 15 jobs in the 50 hours. He receives $50 basic pay plus $25 incentive pay (the difference between the base pay and 15 job prices). In addition, the worker receives $5 extra for the 10 overtime hours. This is computed on the basis of 50% of the $1 base rate, or 50 cents an hour premium. Actually, however, this worker receives compensation during the week at the actual rate of $1.50 an hour ($75 divided by 50 hours), and the overtime premium should be computed on that basis, giving the worker a premium of 75 cents an hour or $7.50 for the 10 overtime hours.

minimum hourly guaranty.[4] The conclusion that only the minimum hourly rate constitutes the regular rate opens an easy path for evading the plain design of Section 7(a). We cannot sanction such a patent disregard of statutory duties.

In this instance 98.5% of the incentive employees receive incentive bonuses in addition to their guaranteed hourly wages, demonstrating that such bonuses are a normal and regular part of their income. Once the parties agree that these employees should receive such piece work wages, those wages automatically enter into the computation of the regular rate for purposes of Section 7(a) regardless of any contract provision to the contrary. Moreover, where the facts do not permit it, we cannot arbitrarily divide bonuses or piece work wages into regular and overtime segments, thereby creating an artificial compliance with Section 7(a).

It matters not how significant the basic hourly rates may be in determining the compensation in situations where incentive bonuses are not paid. When employees do earn more than the basic hourly rates because of the operation of the incentive bonus plan the basic rates lose their significance in determining the actual rate of compensation. Nor is it of controlling importance that the respondent now pays a premium for overtime employment so as to make the overtime rate somewhat above the piece work earnings per hour.[5] Until that premium is 50% of the actual hourly rate received from all regular sources Section 7(a) has not been satisfied.

Respondent also points to the fact that the incentive bonuses are often not determined or paid until weeks or even months after the semi-monthly paydays, due to the nature of the "priced" jobs. But Section 7(a) does not require the impossible. If the correct overtime compensation cannot be determined until some time after the regular pay period the employer is not thereby excused from making the proper computation and payment. Section 7(a) requires only that the employees receive a 50% premium as soon as convenient or practicable under the circumstances.

The judgment of the court below is reversed and that of the District Court is affirmed.

*Reversed.*

---

[4] Thus, in the example given in footnote 3, the worker earns $75 during the week exclusive of the overtime premium. This $75 may be considered either (1) the amount received for completing the 15 "priced" jobs with a $50 minimum guaranty or (2) the sum of the $50 hourly pay and the $25 piece work pay.

[5] The overtime rate now paid amounts to about one and one-third or one and one-fourth the regular hourly rate of actual earnings.

Mr. Justice FRANKFURTER, concurring.

The Fair Labor Standards Act, 52 Stat. 1060, 29 U. S. C. § 201 *et seq.*, does not prohibit employment at piece-work rates. It merely requires that piece-work earnings be converted to an hourly basis for determining the minimum and overtime requirements of that Act. *United States* v. *Rosenwasser*, 323 U. S. 360. Nor does the Act bar an agreement establishing an hourly "regular rate" that does not fall short of the statutory minimum even though it be complicated by a guaranteed weekly lump sum wage adapted to the circumstances of a particular employment, provided it is not a mere artifice unrelated to wage-earning actualities. *Walling* v. *Belo Corp.*, 316 U. S. 624; *Walling* v. *Helmerich & Payne*, 323 U. S. 37. Accordingly, the Fair Labor Standards Act does not preclude a wage agreement whereby piece-rate payments are related, fairly and not evasively, partly to regular hours of work and partly to overtime. Piece rates need not necessarily be so adjusted that they cannot fairly be designed as part of the overtime but must necessarily help "load" the regular hourly wage.

But a properly apportioned overtime function for piece work should be clearly indicated as such in the employment contract. No doubt a law which, while covering piece rates, speaks in terms of hourly rates presents difficulties both for those charged with the law's enforcement and for those under duty to obey it. But if a wage agreement is to escape the obvious arithmetic way of calculating hourly rates based on piece-work rates, by dividing the total earnings by the hours worked, it is not too much to require that the function of piece rates as an overtime factor, if such they be, be clearly formulated. The contract should leave no such dubiety as to the role of the piece rate to the regular hourly rate as the two arrangements before us. It should not be left to courts to work out a hypothetical mathematical interpretation which, if it corresponded with the actual arrangement, could satisfy the statute.

---

Mr. Chief Justice STONE, dissenting.

I think the judgment in both these cases should be affirmed as to all piece work employees and in No. 956 the judgment should be reversed only as to employees working exclusively on the hourly wage basis.

The respondent in each of these cases has entered into a wage contract with its employees, which places in their pay envelopes a weekly wage in excess of the minimum hourly wage rate which the Fair Labor Standards Act prescribes for the work week of forty hours and the additional overtime hours which they work in each week. There is no contention that the contracts were not entered into fairly and in a good faith effort to satisfy all the requirements of the law and to provide the employees with a wage higher than the prevailing rate of pay for like hours of work, with time and a half for overtime. The contract involved in No. 956 was the result of collective bargaining between the respondent employer and the C. I. O. Union of its employees. Both employers and employees desire to continue the contracts, the employers because the employees are satisfied and labor disputes will consequently be avoided, the employees because they receive a larger wage than if they worked at prevailing hourly rates of pay with time and a half for overtime as the statute prescribes.

Under each contract the employees receive for the first forty hours of the work week a guaranteed minimum hourly wage which is equal to or greater than the minimum wage prescribed by the statute. For overtime they receive one and one-half times the hourly wage and in addition a bonus, the amount of which is dependent upon the amount of piece work which they do during the work week. The bonus constitutes an addition to the hourly wage, both regular and overtime, so that in fact the compensation both for time and overtime is greater than the statute requires. The only question involved in either case is whether there is anything in the Fair Labor Standards Act which compels the bonus payment to be added to the stipulated time and overtime hourly wage in any different proportions than the wage itself is distributed.

The Government concedes that the statute does not require respondents to put their piece-workers on hourly wage rates and that they may continue to pay piece work rates and comply with § 7 of the Fair Labor Standards Act, provided only that piece work earnings be "translated or reduced by computation to an hourly basis for the sole purpose of determining whether the statutory requirements have been fulfilled." Such is the effect of our decision in *United States* v. *Rosenwasser*, 323 U. S. 360, 364.

The method of translation urged by the Government and adopted by the Court is to ascertain the average hourly rate of pay by dividing the total weekly piece work wage by the number of hours worked. The hourly rate thus obtained, multiplied by the total number of hours worked per week, plus one-half of the hourly rate multiplied by the number of work hours in excess of forty will, it is said, give the weekly wage which the Fair Labor Standards Act requires respondents to pay to their piece work employees. The adoption of this method in the present cases requires the payment of an additional amount as overtime compensation which, according to the Court's theory, is not compensated by the weekly piece work wage, however high it may be.

This conclusion is based on two mistaken assumptions. One is that the weekly piece work wage, however high, cannot be taken to include any of the wage differential which the Act requires to be paid for overtime hours. The other is that the statute requires that the employer, who pays to his piece time employees a lump sum weekly wage more than enough to pay the hourly minimum rate plus time and a half for overtime, must nevertheless treat the total wage as comprising only the hourly wage paid for all the hours worked, without including anything for overtime. In short, the contention is that the statute requires the distribution of the piece work bonus between the first forty hours worked and the overtime hours in such proportions as would violate the statutory requirement for the payment of an increased rate for the overtime hours. It thus excludes the possibility that the bonus could be distributed in proportions which would compensate the first forty hours at an hourly wage above the minimum statutory requirement and compensate for the overtime hours at one and one-half times that rate.

To ascertain whether the piece work rate can be lawful compensation for time and overtime for which it is paid, the court, like the government, starts with the assumption that it is unlawful, not because it is inadequate in amount but because the bonus was either not intended to be or cannot be taken to be an appropriate increase in the guaranteed overtime compensation, as well as an increase in the guaranteed, regular hourly rate of pay. By assuming that a wage, ample to satisfy minimum demands of the statute for time and overtime, is nevertheless intended to violate the statute by adding all of the bonus to the average hourly wage alone, the conclusion is reached that no increase in overtime com-

pensation has been paid from the bonus. The wage must therefore be correspondingly increased in order to give added compensation for overtime.

Undoubtedly one could translate a piece work wage into an hourly rate which would violate the statute by treating the piece work wage as compensating for the hourly rate without time and a half for overtime. But that has not been done by the parties here. Such is not the necessary effect of the bonus payment, and there is no ground for assuming that such was intended. The fact that the bonus is to be added to a guaranteed minimum hourly rate for both time and overtime would seem to establish the contrary. Certainly no employee under such a contract could doubt that its purpose and function is to pay him for time and overtime at a rate above the statutory minimum. Even though the bonus payments were not thus labeled, where a lawful end may be attained by a lawful means we are not free to assume that it was attained by unlawful means.

The purpose of the Fair Labor Standards Act was to insure to every worker to whom it applies a minimum hourly wage and a fifty percent higher wage for his overtime hours. It was not to force increases in wages paid for time and overtime which are already above the statutory minimum. One may search the statute and its legislative history in vain for any hint that employers who, like respondents, are paying in excess of the statutory minimum wage for time and overtime, are compelled to increase the wage merely because they have failed to label the pay envelope as containing the wage for both time and overtime.

The fallacy of the position now taken becomes apparent at once upon comparison of the following examples, in each of which the employee works fifty hours a week, ten of which being overtime must under the statute be compensated at an hourly wage rate of one and a half times that paid for the first forty hours.

Example 1: The employee works upon an hourly basis at the rate of $1.00 per hour. His wage, as the statute commands, would be $40.00 for the first forty hours of his employment and $15.00 for the ten hours of overtime at the statutory rate of one and one-half times the agreed hourly rate, making a total weekly wage of $55.00.

Example 2: The employment contract, as in the present cases, provides that the employer guarantee the payment of a fixed minimum hourly rate of pay equal to or greater than the statu-

tory minimum plus one and a half times that rate for overtime, plus such additional amount as the employee may earn on a piece work rate. If the guaranteed hourly rate were $1.00 an hour, and the employee's earnings at the piece work rate were $66.00, his wage would be the weekly guaranteed minimum of $55.00 plus the $11.00 piece work bonus at the piece work rate, or $66.00 in all. His weekly wage on the hourly basis would be calculated as follows:

| | |
|---|---|
| Minimum $1.00 per hour for forty hours | $40.00 |
| Bonus addition 20¢ per hour for forty hours | 8.00 |
| Guaranteed minimum overtime $1.50, ten hours | 15.00 |
| Bonus addition for overtime 30¢ an hour for ten hours | 3.00 |
| Total | $66.00[1] |

It will be noted from Example 2 that the weekly piece work wage is sufficient in amount when "translated or reduced by computation" to pay an hourly rate of $1.20 an hour for the first forty hours of work, and $1.80 an hour for the remaining ten hours of overtime. The statute, see § 7, requires no more.

In Example 2, the guaranteed rate of $1.00 per hour and $1.50 per hour for overtime would satisfy every statutory requirement, even though no bonus were added to the weekly wage. It seems plain that the addition of the bonus does not involve the payment of an unlawful wage or any omission to pay the lawful wage. If the employer and employee can lawfully agree to work for $1.20 an hour for the first forty hours and for $1.80 per hour for the additional ten overtime hours, making $66.00, the weekly piece work rate, I can find nothing in the Fair Labor Standards Act or in the principles of fair dealing and common sense to forbid a contract by which the employee is paid the sum of $66.00 for a week's work of fifty hours, or any larger amount, for piece work done in the period of fifty hours.

No basis is suggested for saying that the employer in satisfying the overtime requirements of the statute must distribute a lump sum weekly piece work wage between the wage payable for the

[1] If a equals the hourly rate the following formula would apply to the fifty hour week in which the piece work wage is $66.00:

$$40\,a + 1\tfrac{1}{2}\,a \times 10 = \$66.00$$
$$55\,a = 66.00$$

$a$ = $1.20, the hourly rate for forty hours.
$1\frac{1}{2}\,a$ = $1.80, the hourly rate for overtime hours.

first forty hours and that paid for overtime in such proportions as to render the wage contract illegal rather than in proportions which express the required statutory time and overtime wage relationship of one to one and one-half. There is nothing in the statute requiring the wage contract, the pay envelope, or the pay roll to designate separately the part of the weekly wage which is for the forty hours regular time and that portion which is paid for the additional hours of overtime. It is enough that the weekly wage is that mutually agreed upon in good faith, that it is intended to pay for time and overtime, and that it is sufficient in amount to pay for the first forty hours at a rate above the minimum wage prescribed by the statute and to pay for the overtime at one and one-half times that rate.

When, as here, the wage contract guarantees an hourly wage with one and a half times that rate for overtime, it is obviously just and reasonable and in conformity to the statute to divide the piece work bonus between the regular hours of work and the overtime hours in the same proportions. Under the formula adopted by the Court the employer could pay no piece work rate high enough to dispense with what is thought to be the requirement to increase the weekly wage in order to pay the wage differential for overtime for which, by hypothesis, no piece work rate of pay compensates. Thus a piece work rate which would pay to the employee a weekly wage sufficient to pay several times the minimum hourly rate prescribed by the statute for time and overtime would not be lawful without a wage increase to compensate for the overtime. Despite the government's assurance that the statute does not preclude employment on piece work rates, and our decision to that effect in the *Rosenwasser* case, *supra*, the goal of lawfulness could never be attained by the adoption of such a rate of compensation, since the piece work wage however great can never be regarded as including the wage differential for overtime even though the parties so agree.

All this is in flat contradiction to *Walling* v. *Belo Corporation*, 316 U. S. 624, in which we held that nothing in the Fair Labor Standards Act bars an employer from contracting to pay his employees minimum hourly rates for time plus one and a half times those rates for overtime in excess of the minimum statutory rates, with a lump sum weekly guaranty which in some weeks exceeds the wage at the stipulated hourly rate. There we held that the guaranteed weekly wage was compensation for overtime as well as for

regular time. We decided that the contract contemplated that the excess of the guaranteed weekly wage over the stipulated minimum at the hourly rate was to be so distributed as to recognize the wage differential for overtime, in such a way as to satisfy the statutory requirements, even though the wage contract did not explicitly so declare. 316 U. S. at 632. That case is controlling here. In the present case the "regular rate", within the meaning of § 7(a)(3) of the Act is, as in Example 2, the stipulated minimum hourly rate plus a part of the bonus, and the bonus is, as the wage contracts have treated it, an addition both to the regular rate and the overtime rate, which the statute permits.

Neither *Overnight Motor Co.* v. *Missel*, 316 U. S. 572, nor *Walling* v. *Helmerich & Payne*, 323 U. S. 37, is applicable here. In the *Missel* case "there was no contractual limit upon the hours" which the employer could require the employee to work for the agreed weekly wage, and "no provision for additional pay in the event the hours worked required minimum compensation greater than the fixed wage," 316 U. S. at 581. Hence the court was unable to say that the fixed weekly wage was intended by the parties to cover both base pay and fifty percent additional for the hours actually worked over the statutory maximum. In the *Helmerich* case, *supra*, no attempt was made by the employer to apply the asserted regular hourly rate to the first forty hours of the work week, the actual wage paid being greater. In consequence the overtime wage was less than one and one-half times the hourly wage in fact paid during the first forty hours of the work week. This was an obvious failure to comply with the overtime pay requirements of the statute.

Even though Congress could have compelled an increase in wages above the statutory minimum for time and overtime in the case of all employers who pay wages on the piece work basis, Congress has not done so by the Fair Labor Standards Act or adopted any policy penalizing employers who are so misguided as to add a bonus to a guaranteed lawful minimum hourly wage for time and overtime. It is not our function to prescribe wage standards or policies which Congress has not adopted.

Mr. Justice ROBERTS joins in this opinion.